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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1966

No. 615

**RALPH BERGER,**

*Petitioner,*

—v.—

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

**BRIEF FOR PETITIONER**

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B. In any event, the contention stated in paragraph “A” of this Point I, that no such system of permissive electronic eavesdropping can conceivably be constitutional, is valid as applied to outright trespassory eavesdropping in private premises as is involved in this case.

C. And in any event the particular New York State legislative system here involved for judicially permissive trespassory electronic eavesdropping in private premises is unconstitutional as applied in this case with its factual particulars . . . 15

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IN THE  
**Supreme Court of the United States**

**October Term, 1966**

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**RALPH BERGER,**

*Petitioner,*

—v.—

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent.*

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**BRIEF FOR PETITIONER**

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**Opinions Below**

There is no written opinion by any of the Courts below. In the Court of Appeals of the State of New York, where there was an affirmance without opinion, Chief Judge Desmond and Judge Fuld dissented in an opinion which is reported in 18 N. Y. 2d 638, 640 (R. 691). The "memorandum" report of the affirmance (without opinion) by the Court of Appeals is reported in 18 N.Y. 2d 638 (R. 691). The "memorandum" report of the affirmance without opinion by the Appellate Division, First Department, Supreme Court of New York, is reported in 25 A. D. 2d 718 (R. 676).

## Jurisdiction

The order (remittitur) of the Court of Appeals of the State of New York here sought to be reviewed was dated July 7, 1966 (R. 689). That order affirmed, without opinion, a judgment of the Appellate Division of the Supreme Court of New York, First Department, entered March 17, 1966 (R. 676), which had affirmed a judgment of the Supreme Court of New York, New York County (R. 583), upon a verdict convicting the within petitioner Ralph Berger on two counts of conspiracy to bribe a public official (R. 580). The order allowing certiorari is dated December 5, 1966 (R. 692).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fourth Amendment search and seizure, Fifth Amendment self incrimination, Ninth Amendment reserved right of privacy, Fourteenth Amendment due process), and since there is necessarily drawn in question the validity of a State statute (N. Y. Code Crim. Proc. § 813-a—*ex parte* eavesdrop orders) on the ground of its being repugnant to the Constitution of the United States.

## Questions Presented

Petitioner was convicted of conspiracy to bribe the Chairman of the New York State Liquor Authority. The State prosecutive authorities have stipulated that without the leads and evidence obtained through certain electronic eavesdrops of the "room" or "bug" type, petitioner could not have been indicted, prosecuted or convicted. The questions are (as limited by the order allowing certiorari):

1. Assuming the basic Federal constitutionality of New York State's permissive eavesdrop legislation which allows electronic room eavesdropping or "bugging" by *ex parte* Court order (N.Y. Code Crim. Proc. § 813-a), were the *ex parte* Court orders for the room eavesdrops in this particular case, without which this prosecution stipulatedly could not have been instituted or maintained, nevertheless invalid under the Fourth Amendment because not based upon an adequate showing of probable cause?

2. Is the New York *ex parte* permissive eavesdrop legislation (N.Y. Code Crim. Proc. § 813-a) unconstitutional under the Federal Fourth, Fifth, Ninth and Fourteenth Amendments as setting up a system which intrinsically involves trespassory intrusion into private premises, "general" searches for "mere evidence" and invasion of the privilege against self incrimination; and were the particular room eavesdrops here involved unconstitutional on those grounds?

### **Constitutional Provisions and Statutes Involved**

The case involves the Fourth Amendment (search and seizure), the Fifth Amendment (self incrimination), the Ninth Amendment (reserved right of privacy) and the Fourteenth Amendment (due process) of the United States Constitution.

The State statutory provisions are N. Y. Code Crim. Proc. § 813-a, authorizing *ex parte* judicial orders for eavesdropping; and N.Y. Penal Law § 738, *in pari materia* with the latter statute. These statutes are printed at pp. 62-64, *infra*. The case also involves N. Y. Code Crim. Proc. §§ 813-c to e, motion to suppress evidence. These latter provisions are printed in the Appendix hereto, *infra*.

### Statement of the Case

Petitioner was indicted (R. 2) on two counts of conspiracy to bribe Martin C. Epstein, Chairman of the New York State Liquor Authority. The conspiracy was alleged to have occurred during May and June 1962. The first count involved an alleged bribe in connection with a liquor license for a place called the Tenement Club, owned by Frank Jacklone. The second count involved a bribe in connection with the Playboy Club liquor license in New York City. Petitioner's alleged role was that of a go-between. Petitioner was the only alleged conspirator named in the indictment and he was tried alone; other co-conspirators were named in a bill of particulars (not printed).

During proceedings at the outset of petitioner's trial, on a motion to suppress eavesdrop evidence, the prosecutor and defense counsel entered into the following stipulation on the record (R. 47):

" \* \* \* that without the evidence, or the leads obtained, the evidence obtained through and the leads obtained from, the eavesdropping devices placed in the two addresses, specified in Exhibits 1 and 2, the District Attorney had no information upon which to proceed to present a case to the Grand Jury, or on the basis of which to prosecute this defendant for the crimes charged in the indictment at bar now, and that all of the evidence and the leads obtained, offered by the District Attorney to the Grand Jury, and sought to be offered upon the trial of this (48) indictment, if it is obliged to go to trial, were so obtained from such eavesdropping activities on the part of the District Attorney and his agents and that all the evidence and all the leads were derived therefrom."

(The Exhibits 1 and 2 referred to in the above quoted stipulation will be described *infra*.)

On the basis of this stipulation the defense repeatedly moved, throughout the trial (e.g. R. 239-240, 245-246, 253-254, 259-261, 279, 294), under what came to be referred to in this Record as "the general objection", against the admission in evidence of each item of proof offered by the People which, concededly (pursuant to the stipulation), derived lead-wise from the eavesdrops referred to in the stipulation. This "general objection" by the defense, if it had been sustained—as it concededly should have been if the eavesdrops referred to in the stipulation were unconstitutional or illegal for the reasons which we shall mention—would concededly have required a dismissal of the indictment.

As seen, the stipulation refers to "the eavesdropping devices placed in the two addresses, specified in Exhibits 1 and 2". Exhibit 1 (see R. 22-23, 680-684) was an *ex parte* court order plus the affidavits constituting the application for said order, authorizing a "room" eavesdrop in the office of an attorney, Harry Neyer, at 22 West 48th Street, Manhattan; this order was signed on April 10, 1962 by Judge Joseph A. Sarafite; the affidavits were, respectively, by Assistant District Attorney Jeremiah B. McKenna, and Assistant District Attorney Alfred J. Scotti, both sworn to April 5, 1962. The "Exhibit 2" referred to in the stipulation (R. 684 *et seq.*) consisted of an *ex parte* court order and affidavits for a room eavesdrop in the office of Harry Steinman at 15 East 48th Street, Manhattan, this order being also by Judge Sarafite, signed June 12, 1962 and the affidavits being respectively by Assistant District Attor-

neys David A. Goldstein, and Alfred J. Scotti, both sworn to June 11, 1962.

The earlier of the above two eavesdrops, the one in the office of attorney Harry Neyer, was claimed by the prosecution to have produced leads which were relied upon by the prosecution to obtain the subsequent *ex parte* eavesdrop order for the office of Harry Steinman (details *infra*). The prosecution also claimed that the eavesdropping in the office of attorney Harry Neyer had in turn been preceded by minifon-recorded conversations between a liquor licensee named Panzini and Albert Klapper (an aide of Chairman Epstein of the State Liquor Authority) and Mr. Neyer (R. 23-28, 52-54).

The eavesdrop proofs which were introduced in evidence against petitioner Berger at his trial consisted of the playing of a tape recording (People's Exhibit 61-A, also referred to in the record as Reel 5483—played at R. 497 *et seq.*) which purported to be an eavesdrop recording of conversations in the office of the above-mentioned Harry Steinman at 15 E. 48th Street, Manhattan, on June 28 and 29, 1962. The June 28 conversation purported to be between the petitioner Berger and Steinman; the June 29 conversation between Berger, Steinman and liquor-license applicant Jacklone. The People contended that the conversation of June 29 contained probatively recognizable and material references to the Playboy situation involved in this case (Count 2) and to Berger's alleged dealings with Epstein, plus reference to the Jacklone (Tenement Club) situation (Count 1); and that the June 28 recording related to the Jacklone situation.

The Steinman eavesdrop proofs were received in evidence after the Trial Court had denied our motion to suppress (R. 62).

In essence, the grounds of our motion to suppress (R. 10-63) were that eavesdropping had occurred in this case in constitutionally protected areas, viz., the respective private office premises of Attorney Harry Neyer and of Harry Steinman, amounting to a trespassory intrusion in violation of the Federal Fourth, Fifth, Ninth and Fourteenth Amendments; and that, in the nature of such a trespassory eavesdropping intrusion, as well as in the light of the type of eavesdropping referred to in the language of the State's permissive *ex parte*-court-order eavesdropping statute (N. Y. Code Crim. Proc. § 813-a) which permits eavesdropping upon a showing, *inter alia*, that "evidence of crime may thus be obtained", the eavesdropping was unconstitutional for the further reason that it was not a search for fruits or instrumentalities of crime such as is permitted under the search warrant procedure of the Fourth Amendment, but was a search for mere evidence in the prohibited sense of the traditionally forbidden "general warrant".\*

We also urged that the *ex parte* eavesdrop orders had not been based upon an adequate showing of probable cause (or "reasonable grounds", the language of N. Y. Code Crim. Proc. § 813-a); this contention which we made in the Courts below is further discussed *infra*.\*\*

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\* Question No. 2 in our petition for certiorari herein, as to which certiorari was granted, relates to the foregoing contentions.

\*\* Question No. 1 in our petition for certiorari herein, as to which certiorari was granted, relates to this topic of the Fourth Amendment adequacy of the basis for the issuance of the *ex parte* eavesdrop orders.

Questions as to the audibility of the Steinman eavesdrop recording and as to the authenticity of the police-derived stenographic transcripts thereof have an indirect but important bearing on the present certiorari issues and those questions are taken up in appropriate connections *infra*.

Petitioner Berger was convicted in the Supreme Court of New York, New York County (Schweitzer, J.), after a jury trial, under both counts of the indictment (R. 580). He was sentenced to one year on each count, to run concurrently (R. 581). On appeal to the Appellate Division of the Supreme Court of New York, First Department, the judgment of conviction and sentence was unanimously affirmed, without opinion (R. 636). The Federal constitutional points urged on petitioner Berger's behalf in the Appellate Division were set forth in Appendix D to his petition for certiorari herein. On appeal to the Court of Appeals of the State of New York, the judgment of affirmation of the Appellate Division was affirmed without opinion, Chief Judge Desmond and Judge Fuld dissenting in the following memorandum (18 N. Y. 2d 638, 640, R. 691):

"Chief Judge DESMOND and Judge FULD dissent and vote to reverse on the ground that the electronic eavesdrops inside two offices, one of which was a law office, were unconstitutional under the Fourth Amendment and a physical intrusion into private premises and as a 'general search' for evidence. (See *Siegel v. People*, 16 N Y 2d 330, 333, per DESMOND, Ch. J. [dissenting]; *People v. McCall*, 17 N Y 2d 152, 161, per DESMOND, Ch. J. [concurring]; *People v. Grossman*, 45 Misc 2d 557; cf. *Stanford v. Texas*, 379 U. S. 476; *Silverman v. United States*, 365 U. S. 505.)"

The Federal constitutional points urged on petitioner Berger's behalf in the Court of Appeals were set forth in Appendix E to his petition for certiorari herein.

### Summary of Argument

1. Our argument in this brief, after a short introductory (p. 11) pointing out the ripeness of the electronic eavesdrop issue in this case for an especially comprehensive constitutional review by this Court (i.e., since the case combines trespassory room bugging by State police which in turn is sought to be justified by legislation which allows such bugging by *ex parte* Court order), we undertake a rather extensive discussion of the constitutional philosophy and the social philosophy of electronic spying versus the right of individual privacy (pp. 16-44). We argue in this essay portion of the brief that the constitutional value of the right of privacy should be accepted as an axiom of our legal system, equally with such axiomatic precepts as that human chattel slavery is wrong and that criminal punishment without judicial trial is wrong. We suggest also that, except perhaps for situations of supreme public necessity involving the physical safety of the Nation or of a populated community or a vital public installation, electronic spying (especially trespassory bugging) should be constitutionally outlawed *in toto*; and that even in the cases of extreme emergency, electronic spying should be permitted only for purposes of preventive security action rather than for the obtaining of prosecutorial evidence.

2. We next argue (pp. 44-51) that, in any event, no conceivable system of advance secret judicial permissiveness can obviate the inescapable unconstitutionality of tres-

passory bugging in private premises, because such bugging inevitably effects a "general search" and violates the Fourth Amendment prohibition against a search "for mere evidence", if the purpose of the bugging is with a view to criminal prosecution.

3. Further as to the question of advance judicial permissiveness, we argue (pp. 51-58) *inter alia* that *Osborn v. United States*, U.S. , 17 L. Ed. 2d 394, is not determinative, because *Osborn* involved, perhaps uniquely, a specific and particularized situation in which it was in fact feasible as a practical matter to confine the electronic search to words or conversations relating exclusively to a specific criminal charge; and because *Osborn* did not involve a trespassory bug administered by a surreptitious outsider, but a "minifon"-type device worn by a visitor known and welcome to the person whose conversation was recorded.

4. We next describe (pp. 58-65) the legislation of the four States in addition to New York which have statutes for advance judicial permission of electronic spying, and we show that none of those statutes, including the New York statutes, overcome the constitutional objections of "general search" or of search for "mere evidence".

(All of the foregoing is in Point I of our argument.)

5. We then argue (Point II) the Fourth Amendment inadequacy of the affidavits on the basis of which the *ex parte* eavesdrop orders in this case were obtained. Those affidavits fail to state "probable cause" either in terms of reason to believe that criminal activity appropriate for constitutional search was involved, or in terms of attesting to the reliability of the informer.

6. We then describe (Point III) the poor probative qualities of the electronic recordings used in this case. We go into this topic for its bearing on the constitutional acceptability of the New York State electronic spying procedure as applied in this case.

7. In a concluding point (Point IV) we briefly recapitulate our constitutional contentions in light of all of the foregoing.

## **ARGUMENT**

### **Introductory to Argument**

This case of trespassory electronic room-space eavesdropping or "bugging" by State police officers is before this Court for decision on the merits with the issue of the Federal constitutionality of such eavesdropping presented on the record in a manner which renders the issue appropriate for consideration by this Court in a more comprehensive way than in previous cases of such "bugging" which have reached this Court. Contemporary constitutional discussion of such trespassory electronic eavesdropping has come to include, as a prime remaining topic on which this Court has not yet definitively ruled, the topic of judicially permissive eavesdrop orders as affording a possible basis for obviating in a particular case this Court's altogether positive rulings, rendered in situations not involving any such permissive judicial orders (*Silverman v. United States*, 365 U.S. 505; *Clinton v. Virginia*, 377 U.S. 168), that trespassory electronic "bugging" violates the Federal Constitution.

As seen, petitioner Berger has been convicted and sentenced in a State criminal prosecution which, *stipulatedly*, could not have been instituted or maintained without the trespassory electronic eavesdrops; and the highest State appellate Court has affirmed the judgment of conviction and sentence, with two Judges of that Court dissenting explicitly on the ground of the Federal unconstitutionality of the eavesdropping. Nor does the case involve any fine-line question of physical "trespass" *vel non*, because it is undisputed that the room or "bug" type of electronic eavesdrop here used was effected by installing a concealed microphone or "bug" in the respective rooms, that the method of hooking up the "bug" for transmission of sound to the recording device in a nearby building was by wiring the bug to unused telephone wires found in the room, that installation of the "bug" required secret physical entry into the rooms, and that at least one of the police wiremen made at least one subsequent entry into the "bugged" area (R.294-295, 299-302, 308-314).

Unless, then, the existence of New York State's permissive *ex parte* eavesdrop order legislation (N. Y. Code Crim. Proc. § 813-a) and the resort which was here had to the processes of that legislation by the New York police may justify a different constitutional conclusion, the electronic eavesdrops here involved fall under the ban of the *Silverman* and *Clinton* cases, *supra*, and of *Black v. United States*, — U.S. —, 17 L. Ed. 2d 26 and *Schipani v. United States*, — U.S. —, 17 L. Ed. 2d 428. See also *Wong Sun v. United States*, 371 U.S. 471, 485 (" \* \* \* It follows from our holding in *Silverman v. United States*, \* \* \* that the Fourth Amendment may protect against the overhear-

ing of verbal statements as well as against the more traditional seizure of 'papers and effects'.')\*

The reasoning in *Osborn v. United States*, — U.S. —, 17 L. Ed. 2d 394—this Court's most recent expression on the subject of judicially permissive electronic eavesdrop surveillance—throws additional important light on this issue of judicial permissiveness; indeed the importance of *Osborn* in this regard is such as to require a rather extended discussion of that case in this brief beyond the scope of this "Introductory", and we treat the *Osborn* case in detail at pp 51-58, *infra*.

In the Courts below, and in opposing the grant of certiorari in this Court, the State prosecutive authorities urged that the electronic room eavesdropping here involved was saved from unconstitutionality by the fact that it was done pursuant to *ex parte* judicial permission under the State legislation above mentioned (N. Y. Code Crim. Proc. § 813-a); and while neither the Appellate Division nor the majority Judges of the Court of Appeals gave a written explanation of their reasons for affirming the within conviction notwithstanding its stipulatedly indispensable dependence on the trespassory eavesdrops, the dissenting opinion of Chief Judge Desmond and Judge Fuld of the Court of Appeals denotes that the issue which divided the latter Bench in regard to the eavesdrops was whether *any* state system of permissive trespassory electronic room eavesdropping can be constitutional under the Fourth Amendment.

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\* The Fourth Amendment considerations apply, needless to say, to State action of the kind here involved. *Mapp v. Ohio*, 367 U. S. 643; *Clinton v. Virginia*, *supra*.

As said, this Court has not yet ruled on the latter issue—the expressions on the subject by some of the Justices in *Lopez v. United States*, 373 U. S. 427 and in the *Silverman* case, *supra*, did not constitute a ruling by the Court itself; and the *Osborn* case *supra*, dealt with the issue in a context not determinative here (details as to the effect of *Osborn* are presented *infra*, as mentioned). This case, however, squarely and inescapably presents the issue, at least it presents the issue in the following form: Is N. Y. Code Crim. Proc. § 813-a, which permits electronic room eavesdropping by *ex parte* judicial order upon a showing of “reasonable ground to believe that evidence of crime may be thus obtained”, constitutional under the Fourth, Fifth, Ninth and Fourteenth Amendments as here applied?

Integral with this latter constitutional issue, and in a sense anterior to or of “threshold” import for consideration of that issue, is the issue herein (accepted by the Court for certiorari consideration in the form of our Question Presented no. 1, p. 3, *supra*; and see R. 692) as to the Fourth Amendment (“probable cause”) adequacy of the police affidavits which were used to obtain the *ex parte* Court orders for eavesdropping in this case. This question of the Fourth Amendment adequacy of the affidavits is being deferred until a later place in this brief (Point II, *infra*), after we shall first have discussed the issue of statutory constitutionality.

## POINT I

**A. Except perhaps for situations of supreme public necessity involving the physical safety of the nation or of a particular populated community or vital public installation, and even then only for purposes of preventive security action by responsible governmental agencies at the highest level rather than for the obtaining of prosecutorial evidence, and even in such supreme emergency situations only when the action is taken under federal rather than state authority, no conceivable system of judicially permissive trespassory or other physically intrusional electronic eavesdropping—including “electronically” or “acoustically” intrusional methods involving no “tangible” physical trespass or intrusion in the conventional senses understood by persons who are not trained physicists—can be constitutional under the Fourth, Fifth, Ninth and Fourteenth Amendments.**

**B. In any event, the contention stated in paragraph “A” of this Point I, that no such system of permissive electronic eavesdropping can conceivably be constitutional, is valid as applied to outright trespassory eavesdropping in private premises as is involved in this case.**

**C. And in any event the particular New York State legislative system here involved for judicially permissive trespassory electronic eavesdropping in private premises is unconstitutional as applied in this case with its factual particulars.**

The above three-step formulation of this Point I states in descending order, so to say, the stages of the analysis needed for consideration of the issue of statutory constitutionality in this case, as we see it. Our discussion under the sub-headings of this Point I which now follow will be

aimed at elucidating each of the three lettered paragraphs captioned above, but such elucidation will not exactly follow the sequential lines of the above lettered paragraphs, for reasons which we trust will reveal and justify themselves as we proceed.

**Introductory to Point I: The "Philosophy" of Electronic Eavesdropping and the Constitutional Values Which It Challenges Even When the Eavesdropping Is by Permissive Secret Judicial Order.**

It has been well said that our constitutional search and seizure provisions "did not confer a right upon the people. . . . The right guaranteed was a right already belonging to the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. . . . To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon." *District of Columbia v. Little*, 178 F. 2d 13, 17 (C.A. D.C., 1950), aff'd 339 U. S. 1.

In other words, it is not, in any particular instance, the right to be let alone in one's privacy which has to prove itself as against offered intrusion; it is, rather, the searcher's or demandant's intrusion which has to be shown to be justifiable as against the traditionally, nay the axiomatically presumed "right of the people to be secure in their persons, houses, papers, and effects." U. S. Const., Amdt. IV.

So fundamental to our democratic-humanistic system is the right of individual privacy that, willingly facing a possible taunt of Transcendentalism, the constitutional lawyer

may venture to characterize the right of privacy as "pre-constitutional", or "supra-constitutional".

The right of the individual to be free of unwarranted police intrusion against his privacy does not always receive; in practice, the protection which its express constitutional character (not to say its "pre-constitutional" character) would seem to require. The scope and the connotations of this right are matters of widespread and intense controversy at the present time perhaps more than ever before, as the competing claims of the apace-advancing technology of electronic spying are pressed by proponents of police authority. The instant case brings this controversy before this Court in an issue-setting which, as above said, poses the constitutional problem of electronic eavesdropping in the most inclusive form in which it has thus far come before this Court, *viz.*, whether the general ban against the most extreme kind of electronic spying by police against private individuals (trespassory room "bugging") may constitutionally give way on a selective basis if the selection but be made by a Judge acting in secret on a secret application by police officers.

The circumstance that at a particular juncture in constitutional history a fundamental precept of the Constitution is under strong attack may reflect either that the evolving character of the Constitution is readying for a wholesomely needed mutation or variation, or that a wholesome constitutional stability as to the matter in question is being threatened and that steadfastness is needed to repel the threat. At such crucial junctures in this country's history it has more than once been the special responsibility of this Court to try to determine correctly, for the good of the

Nation, which of the alternative dynamics just mentioned is operating in the particular confronting situation. There is perhaps a still profounder way in which one may understand how this Court's unique role may be called into functioning at these supreme junctures in the continuing course of our constitutional evolution. One may speak of two classes of great constitutional "verities" under a system of our American type. First, there are those great constitutional "verity" rules which at some fairly defined point in time may be said to have attained their maximum fulfilled *vitality*, as an accomplished constitutional and social fact, through the decisional pronouncement of this Court in the first instance and through their subsequently having become accepted as a practical working reality throughout the country at large. Second, there are those other likewise great constitutional "verity" rules, affecting matters which may be equally as important as those involved in the rules of the first class just mentioned, but which are still evolving, both as to the form and the firmness of their enunciation by this Court and as to the extent of their practical acceptance by the country. The rules of the first class, the great constitutional "verity" rules whose axiomatic acceptance has become an accomplished historical fact in the country's life and thought, have always been most rare when what was involved was some really basic question of social "value judgment", and even rarer when the "axiomatic" value judgment involved has embraced some really integral matter of social ethics or social philosophy, i.e., when what was at stake has been the basic constitutional arrangements for administering the relationship between government and individual in the interests of either preserving or changing the essential "power" structure of the

country's social system or its attendant system of moral assumptions—in a word, when what has been involved is that ultimate polity choice, Liberty or Authority.

The rarity of this kind of universally accepted social-governmental "value axiom" is, of course, a fact not confined to the scene of our own constitutional history. The instances in history generally, or, more pertinently, in the history of modern Western man, in which the ultimate consensus of an informed democratic citizenry has produced virtual dogma-accepted unanimity on any such fundamental question of value judgment in matters of liberty-versus-authority may probably be counted on the fingers of one hand. One such instance which comes to mind is the apparent consensus of decent mankind that human chattel slavery is wrong. Another instance, in our own constitutional system, is that criminal prosecution and punishment without judicial trial are wrong.

It is difficult to think of other examples of social "dogma" in matters of individual constitutional right that enjoy practical unanimity or undisputed acceptance even among democratically organized peoples like ours who operate under a system of constitutional limitations imposed upon a theoretical "parliamentary sovereignty". That is, aside from the two instances above mentioned—abolition of slavery, and the right of judicial trial on a charge of crime—it is difficult to think of any other constitutional rights of the individual as to which significant opposition is practically non-existent. In this country no serious person, or no person worth being seriously listened to, stands up any longer to favor slavery or criminal punishment without trial. On the other hand, restrictions or qualifications continue to

be favored in more or less significant and responsible ways as regards other individual rights usually thought of as basic. Even the principle of universal adult suffrage, the supposed *sine qua non* of democracy and of its sister doctrine popular sovereignty, has never ceased to be directly or indirectly resisted, and from time to time rendered *pro tanto* ineffectual, at the hands of influential elements in the modern democratic nations. One may likewise think of other examples among our theoretically basic constitutional principles which deserve or may deserve total acceptance and total effectiveness but do not yet unqualifiedly have such status and effect as a practical matter— e.g., free speech and free press, unqualified freedom from racial discrimination, and unqualified freedom from compulsory self incrimination (as against the compulsions of “immunity” laws); even freedom of thought in matters of religion (or irreligion) is far from having achieved total success against openly declared bigotry and ignorance.

Few indeed, then, in history have been the “social truths” of individual right whose unquestioned acceptance “all mankind cries out with one voice”. And the short list of these universally accepted examples above suggested— again, we were not able to enlarge our list beyond the two unqualified examples given, involving slavery and criminal trial—has been the product of long evolution, an evolution moreover whose course in this country has indispensably needed spur and guidance from this Court.

We respectfully believe that the present case involves a social and constitutional principle of individual right which deserves to rank, in the Bill of Rights area, with the principles of abolition of human chattel slavery and

the right to due process judicial trial before criminal conviction and punishment. In this matter of the right of individual privacy against improper police intrusion there is no more room, under our constitutional system, for arbitrary and secret use of governmental power, than there is room for instruments of "title" to or "conveyance" of human slaves, or for *lettres de cachet* or Star Chamber proceedings as "process" for criminal punishment.

At the very least, we submit that socially and constitutionally equal with these latter values (against slavery and arbitrary criminal punishment) is the value of the right of individual privacy against any conceivable intrusion except upon grounds shown in a conclusive and cogent way to be of the most uncompromisable necessity for the very existence and safety of the community.

It unfortunately tends to be easy, in particular social times and circumstances, to fall into a short-sightedness concerning the high value of individual privacy when challenged by assertions of "police" need. It is a commonplace idea, declared by wise minds many times in the history of human thought and human strife, that such short-sightedness or impatience in matters of liberty *versus* authority are a foremost peril to public morality and good social sense. This country at the present time is grappling in manifold ways with stresses of public morality and sensible social judgment to an extent probably unprecedented in our history. A principal area of these stresses involves the national "crime problem", or the concomitant problem of effective "crime-fighting" by police agencies. Unfortunately, this situation which, despite the unusual magnitude of crime incidence at present, might

normally have a chance of being soberly regarded and administered in an enlightened manner by agencies and persons of good will, as a specifically defined problem of enforcement of criminal laws, has been tensionized far beyond sobriety and normality in the present-day national attitude by aggravations for which no one is to blame unless it can be said that History is to blame for man's woes or for particular intensifications thereof. The increase of population on the geometrical scale set by an implacable biology, the consequent sheer crowding in our massive urban environments, the continuing disparities between wealth and poverty, the corroding of individual character qualities as traditions give way to Science (or, all too often, to mere scientisim), and perhaps above all the explosive dynamics of race as groups long resignedly subservient emerge into activism for good or ill—these are among the major factors which are hampering a sober and normal approach to the current "crime problem". Social historians would doubtless add also the factor of mass-and-individual personality stress, if not disintegration, which arises in an era like the present when physically violent strife occupies so large a portion of the mental and physical energies of even the most advanced nations through the instrumentality known as War.

Nor must it be forgotten, in this recital of the items upon which we ought all to reflect in trying to understand the present day issue of crime-fighting *versus* the Constitution, that the historical juncture in which we stand in this year 1967 is but relatively a moment removed, even in short range historical measurement, from that recent time when, as an entire nation, we succumbed to a shame for

which the only "precedent" in our history is the episode of the Alien and Sedition Laws. The departure from law and steadfast democratic tradition which is inherent in manifestly oppressive methods of law enforcement is so fundamentally shocking that it is perhaps in the very enormity of this shock that we must search for explanation of the astonishing indifference and insensitivity which so much prevail in some quarters of this country today concerning these matters. That certain Catalinian species of United States Senator who briefly held this country in terror and in thrall little more than a decade ago did not fail of his purpose entirely, if we are correct in suggesting that the anti-rational and the anti-traditional precepts of constitutional immorality which at that time were infused into the minds of the citizenry are continuing to disorder the thinking of many people and to make it difficult to conduct temperate and rational debate on the contemporary constitutional issues of criminal law enforcement. We have no wish to draw the busy attentions of this Court into a re-living of the execrable days of the early 1950's in the respects to which we are here alluding, but we do think that in connection with the present days proposals for a selective *ex parte* "judicial" unleashing of the "constitutional" Bloodhounds of electronic surveillance, it is important to remember those days and how their unwholesome effects continue to this time. It was in those days, not very long ago, that a visitor coming upon our scene could have readily imagined himself viewing a people gathered in a Coliseum to applaud the savagery of the Sovereign himself, as a people once applauded a Commodus.

If we may carry one step further the figure of speech just suggested, and in the same ancient language which

framed and expressed the thought of the sometime noble thinkers of that sometime splendid bygone Civilization, one good way of expressing what this country needs today in the face of the police challenge to the right of individual privacy by electronic intrusion, is that this country would do well to hold in mind those ancient and grand words "*sub specie aeternitatis*". In a democratic society which professes fidelity to the principle of a written Constitution containing a bill of Rights, in a country which affirms or professes to affirm the values connoted in such a constitutional charter of individual human liberties, the last thing that should be countenanced is, as we suggested at the outset of this introductory to our Point I, an attitude of historical short-sightedness or impatience that might and probably must endanger the ancient verities and values codified in our Constitution as to the relationship between limitedly empowered government and the free citizen. Seldom if ever in our constitutional history has there been a more fitting and indeed a more necessitous occasion for conducting our constitutional discourse *sub specie aeternitatis*, than in the present debate over electronic police spying in derogation of the right of individual privacy.

. . . . .

Under subsequent headings in this Point I we shall present the specific constitutional considerations which are believed to affect the question of permitting policemen to conduct secret electronic surveillance of private premises under the authority of secret judicial order. But we should first like to complete this introductory essay of ours by a few more general observations:

1. In the Courts below, and in opposing the grant of certiorari herein, our adversaries, the prosecutive authorities

of the State of New York, sought to justify the intrinsic and inevitably unlimited character of the "search" involved in electronic room-eavesdropping—see our discussion at pp. 44-51, *infra*, of the Fourth Amendment "general search" problem and of the problem of searches for "mere evidence"—by the analogy of the police searcher who must sift through innocuous materials in order to find the "specific" items allowed by the search warrant. This amounts to suggesting that private individuals should accept the company (undisclosed and furtive) of police electronic auditors in their private homes and business places because the police eavesdroppers will be cocking their ears or animatedly alerting themselves only for "crime" during the continuous auditory surveillance. This amazing idea finds "precedent" in one "authority" that has come to our attention, namely, the late George Orwell's "1984", where everyone's home contained visual and auditory electronic installations by which "Big Brother" could keep himself continually apprised of all or any happenings in the private premises of the citizenry.

It is worth examining in a little more detail this astounding suggestion that the private citizen ought not to mind living his private life in his private premises under the ever overhanging presence of the electronic police eye and ear, because in that way "crime" may be better detected. Who among us would knowingly accept such an atrocious invasion of our private homes and business places? Who among us would be consoled, in accepting such an insulting and intolerable intrusion upon our private lives, by the reassurance that the secret eavesdropper's attention would not be focused upon us in a "specific"

way until we spoke a "criminal" word or did a "criminal" deed?

The foregoing is, in effect, the prosecution's own choice, in this case, as to the best means of formulating the argument in favor of the electronic "general search" pretensions of the mid-Twentieth Century American police mentality. This draws the issue with unmistakable clearness. It is the issue of whether higher value attaches to individual right and freedom in our society, or to the interests of police enforcement of the criminal laws. The extreme logic of the position preferred by the prosecutive authorities in this case—that policing comes ahead of human private dignity—is in fact to be welcomed, because it shows to us, to all of us, to Judges and to lawyers and to laymen, where all this leads. Again, we respectfully say that where "all this leads" is, literally, to "1984".\*

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\* We might have mentioned at an earlier place in this possibly pretentious-sounding introductory to our argument on the "philosophy" of electronic spying, that we surely do not presume to stake out any claims of originality (in the sense of first discovery) in the essay treatment of the subject set forth in the preceding pages and in the text which immediately follows. And if this essay treatment of ours is lacking in scholarly annotations, it is not because we wish to deprive the Court of research leads, but because the topics being treated in this introductory are of such a nature that scholarly annotation thereof would smack of pedantry. What we are trying to say in this footnote was much better said in Cervantes' preface to *Don Quixote*, where the author lamented that he might be charged with offering to the world nothing "but a dry, insipid Legend, not worth a Rush \* \* \* without either Quotations on the Margin, or Annotations at the End, which other Books \* \* \* have to set them off \* \* \*. I want all these Embellishments and Graces \* \* \*. I do not so much as know what Authors I follow \* \* \*. [B]esides I am naturally lazy, and love my Ease too well to take the Pains of turning over Authors for those Things which I can express as well without it." *Miguel de Cervantes, Don Quixote (Ozell's Revision of the Translation of Peter Motteux)*, pp. xx-xxi (1930).

2. Whether or not we adopt a teleological view of the Universe or of the place of Homo Sapiens in it, there are physical and physiological facts as to the nature of the world and Man's place in it which must be taken into account in any thoughtful consideration of the ultimate meanings of electronic intrusion upon individual human privacy. Aside from claimed instances of what has come to be known as "ESP", each member of our biological species goes about the daily course of his life pretty effectively secure in the knowledge that none of his fellows can probe his own secret mind. This opportunity which each human individual enjoys for preserving his inner autonomy of psyche or "soul" except as he voluntarily chooses to disclose it to or share it with others, is, in functional biological terms, the basis that enables each person to preserve his ultimately unassailable individual privacy if he has the wish and the will power to do so. Teleologically considered or not, as we above suggested, this always available invulnerability of the private human mind, is a fact which intrinsically prevents or can prevent, in any instance, an unwanted intrusion upon one's individual privacy of mind or soul. Of course, we have now the atrocious phenomenon of chemistry known as the "truth drug"—atrocious, that is, when it is forced upon an individual without his free consent—but the atrocity of compulsory administering of a "truth drug" is something that we all know will never be countenanced in this country "while this Court sits". So that, it may be stated as a self evident fact of human physiology and constitutional law that there is "no power under Heaven" which can legally compel an unwilling individual to surrender the secrecy of his mind:

Why is not the situation exactly the same in regard to the physiological facts which nature has laid down in connection with the human sense organs of speech and hearing (and sight)? Absent artificial aids to the senses of hearing (and sight), it has been from the beginning of man's existence a matter of sure knowledge on the part of each human individual that there are available to him fairly ready means of guarding his privacy of speech (and visibility) against unwanted intrusion. The person who does not want others to hear what he is saying (or to see what he is doing), has always been favored by an apparently wisely ordered Nature with easy facilities for preventing such intrusion—always, that is, until the advent of the technological spying devices of the present era, which has given us electronic auditory methods, infrared and photographic visual methods, and no one knows what other methods may be presently under way or may be yet to come as the ingenuity of science may contrive. Free of these technological espionage devices, an individual always could, and still can, preserve his privacy of speech and visibility against unwanted intrusion by various simple physical means of self-protective withdrawal or enclosure. But no such withdrawal or enclosure can necessarily avail against the insidious penetrations of today's electronic spying devices (or of the infra-red and photographing devices mentioned).

It is our respectful contention that any constitutionalizing of police-spying devices which would set at naught the physical and physiological boundaries that the facts of the natural world and of man's body have always provided as *ipso facto* protections for the ordinarily invulnerable

privacy of each human individual, would involve so drastic, so far-reaching, so unpredictably destructive an overturning of the most fundamental arrangements for the ordering of decent human society, as to be unthinkable—not only constitutionally unthinkable, but above all unthinkable to anyone whose vision of Man is of a predominantly spiritual rather than of a predominantly material or carnal character. Indeed, one does not have to be a teleologist avowing belief in man's destiny of progress or nobility, to be appalled at the threat of a technological obliteration of the protective arrangements that physics and physiology have heretofore always assured in defense of the individual privacy of men's minds or souls. It is only necessary that one favor or desire, out of whatever existential or other philosophically arbitrary choice attitudes one may prefer, a continuation of the chance of each individual human being to go on having the effective right of private life, private speech and private thought which the natural facts of man's existence heretofore have made possible, to impel one into instantly and indignantly rejecting the idea of technological abolishment of the age-old privacy of the voluntarily controllable expression of one's vocal senses.

We have joined to our above discussion of the right not to have one's private speech electronically overheard, the theme of one's right not to be visually seen when one's preference of privacy is to the contrary. In thus enlarging the realm of our discussion, it has not been our thought, needless to say, to convey to this Court that we deem our own specific case of trespassory eavesdropping to be inextricably bound up, for present decisional purposes, with all of those larger considerations of human sensory and mental

privacy above mentioned. This case of trespassory electronic eavesdropping stands in the framework of its own constitutional issues. And yet, we have felt that, in the interests of a full exploration of the constitutional-philosophical connotations of the subject, it is our duty to speak in this brief along the broader lines above proposed.

3. In fact, it is because of our earnest belief that the specific constitutional problem which this case poses in regard to trespassory electronic eavesdropping, does unavoidably carry with it at least for purposes of larger perspective, the epochally important topics of philosophical inquiry above sketched, that we suggested earlier in this introductory portion of our argument that the ultimate issue of constitutional "value judgment" involved in this case of individual privacy *versus* police electronic spying is matched or surpassed in importance by perhaps only two other issues of constitutional "value" of the past, the issues of human slavery and of arbitrary punishment for crime.

We are respectfully convinced, in short, that this is in the supremest sense a Great Case. Acting on this conviction, we have felt it to be our duty to try to approach the constitutional issue in commensurately high terms. And out of this same attitude of awe for the task in which we are privileged to have a participation as counsel before this Court in the present case, we submit the following further broad observations—addressed to the theme in the point heading for this Point I (p. 15 *supra*) that if a system of secret permissive judicial orders for trespassory electronic spying upon private individuals is to obtain the constitutional approval of this Court, such ought not conceivably to be allowed except in situations of the most ex-

traordinary public emergency, a category into which the present case cannot possibly fall. This latter topic will be treated under a separate sub-heading, which now follows.

**The Impossibility Of Devising A Constitutionally Satisfactory "Judicial Warrant" Procedure For Trespassory Electronic Room "Bugging" In Private Premises—A Topic Which We Develop In Detail Under A Subsequent Heading—Leaves No Escape From The Conclusion That Evidence Thus Obtained Can In No Event Be Used Prosecutorially, And That If The Practice Can Conceivably Pass Constitutional Muster At All It Would Be Only In A Proper Case Founded On The Strength Of The Most Carefully Devised Legislation So Drawn As To Limit The Practice To Cases Of The Most Extreme Public Emergency, Allowing The Practice Only For Preventive Security Action, And Requiring Advance Approval In Each Instance By Governmental Authorities Of High Station And Responsibility, And Preferably Only After Consultation Also With Judicial Authority.**

The present case involves a charge of conspiracy to bribe the chairman of the New York State Liquor Authority in order to obtain liquor licenses for two New York City nightclubs. The files of the Clerk of this Court contain correspondence in which we protested against what we considered the excessive and unnecessary counter-designation by the respondent herein of the portions of the record below to be printed in the instant record in this Court. The respondent's reason for designating the disputed items to be printed was that the respondent wants this Court to see in detail how serious a case of corruption of a public officer this case is; that is, as we understand it, the respondent wants this Court to see how reasonable and how necessary it was to resort to trespassory electronic room bugging by secret judicial order in this case of alleged official corruption.

Any case of corruption of a public officer is serious and important. The point does not have to be argued, and we surely do not dispute it. But, with all respect we do not think that the integrity of the issuance of nightclub licenses to Mr. Hugh Hefner's Playboy Clubs or to Mr. Frank Jacklone's Tenement Club is important enough to justify overriding the protections which the Constitution of the United States establishes for the right of individual privacy against trespassory electronic room bugging. And there are persuasive indications that this opinion of ours would be shared by the President of the United States, the Attorney General and the Solicitor General of the United States—and, we trust, this Court.

In his recent State of the Union message, President Johnson stated:

"We should protect what Justice Brandeis called the 'right most valued by civilized men'—the right to privacy. We should outlaw all wiretapping, public and private, wherever and whenever it occurs except when the security of this nation itself is at stake—and only then with the strictest governmental safeguards. And we should exercise the full reach of our constitutional powers to outlaw electronic bugging and snooping." (New York Times, January 11, 1967)

Twice within recent months the Solicitor General of the United States has alluded, in papers filed by him in this Court, to a "policy" or "policies declared by the President on June 30, 1965, for the entire Federal establishment" which "prohibits such electronic surveillance or the use of such listening devices (as well as the interception of telephone and other wireless communication) in all instances

other than those involving the collection of intelligence affecting the national security". These words appear in the Solicitor General's now famous two documents entitled "Supplemental Memorandum for the United States", one filed in *Black v. United States*; no. 1029, October Term 1965, at pp. 3-4; and the other filed in *Schipani v. United States*, No. 504, October Term 1966, at p. 4. In the *Black* memorandum the Solicitor General further said, "The specific authorization of the Attorney General must be obtained in each instance when this exception [national security] is invoked" (p. 4). In the *Schipani* memorandum the Solicitor General further stated that "such [national security] intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked" (p. 4). In the *Schipani* memorandum, p. 4, fn. 3, the Solicitor General also stated:

"A memorandum of the Acting Attorney General of November 3, 1966, addressed to all United States Attorneys, summarizes the Department's policy in this regard as follows:

This Department must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness. We must, also, scrupulously avoid any situation in which an intrusion into a confidential relationship would deny a fair hearing to a defendant or person under investigation."

In the *Schipani* memorandum the Solicitor General also informed the Court as follows (p. 5):

"Recognizing its obligation not to use evidence obtained in violation of a defendant's protected rights, in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial. Reports of the results of this continuing review are being sent to the Acting Attorney General. Similarly, a careful review of pending and prospective prosecutions is being conducted by the Department for the purpose of determining what other cases might fall within this category. This will necessarily be a time-consuming process but will be diligently pursued to completion. The government will promptly notify the appropriate court when any material discovery is made."

Thus, climaxing the contemporary nation-wide debate over electronic invasion of individual privacy, the highest officials of the Executive Branch of the Federal government charged with this country's most important law enforcement tasks, have arrived at the conclusion that trespassory electronic room bugging should be resorted to only in cases of national security and that evidence thereby obtained shall not be used for prosecutorial purposes. The inference is plain, furthermore, from the several above quoted pronouncements of the President and the Department of Justice, that a need is felt in those high quarters for legislation by Congress to implement the Executive prohibitory policy against electronic surveillance except for purposes of national security.

Reading between the lines of the above quoted recent Executive pronouncements, one may perhaps discern also that perhaps the President and the Department of Justice do not desire Congressional legislation for the national security cases where electronic surveillance may be deemed necessary on an Executive level. We of course have no wish to enter into this latter delicate and difficult subject except so far as is necessary for the purposes of the issues of this case. We therefore confine ourselves to the following two observations: (1) The contemplated Federal Executive use of electronic surveillance for cases of national security expressly excludes prosecutorial use of evidence thereby obtained. (2) The national security situations mentioned by the President and the Department of Justice apparently do not contemplate any independent electronic surveillance activities by State authorities or upon State initiative.

We submit that the policy conclusions evidently embodied in the above Federal Executive pronouncements, to the effect that (1) all electronic surveillance is constitutionally improper (or at least that all electronic surveillance forbidden by 46 U.S.C. § 605 and by the decisions of this Court, which would include trespassory room bugging, is improper) except in the interests of national security, and (2) that no electronic surveillance of the classes thus deemed improper (including that done for national security) can give rise to prosecutorial evidence, authoritatively reflect the maximum or outermost bounds of constitutional permissibility in this field. At the least, surely those are or ought to be the outermost constitutional bounds for trespassory electronic room bugging in private premises.

As noted, the President and the Department of Justice have remained silent on the question of whether legislation is needed to authorize electronic surveillance for non-prosecutorial purposes in national security cases. But we think that this question is not necessarily important for decision of the present case. For, even if Congress or indeed the Legislature of the State of New York, were to adopt legislation authorizing trespassory electronic room bugging for non-prosecutorial purposes in national security cases, that would not validate room bugging such as was done in this case.

In our discussion thus far of national security or extreme public emergency situations as affording an admittedly compelling class of situations in which electronic surveillance (including trespassory room bugging) may need to be constitutionally countenanced subject to a rule of exclusion of the evidence for prosecutorial purposes, we have been referring, without more, to the recent pronouncements of the President and the Department of Justice. That is, we have been accepting those pronouncements as self-evidently justifiable from a constitutional standpoint, without offering any detailed evaluation or comment of our own. Since the Court will doubtless wish to know just what our own view is on this subject, as a party in this litigation, we now respectfully add the following:

We agree with the President and the Department of Justice that, as a matter of sheer necessity, some way must be found under our Constitution to provide this country's military defenders with effective means of electronic surveillance in cases authentically affecting the national se-

curity. Indeed, we go a step farther, to include within the term "national security" any supreme public emergency affecting the physical safety of any populated community or vital public installation. What we have in mind is those situations of sabotage or other destructive violence which do not necessarily have a national defense or military connotation, but which nevertheless do literally affect public "security" from a supreme emergency standpoint. All must recognize that, especially in these times, weapons or other devices of major destructive power may come into the hands of persons not necessarily acting for a hostile foreign power or a declared military enemy. Hence, the categories of supreme public emergency with which an informed policy of permissive electronic surveillance must deal are perhaps not sufficiently comprehended within the term "national security", and we readily admit that this is so.

However, the very factor of added complexity which enters the analytical picture by virtue of this concession or further insight into the problem which we are here proposing, immediately and necessarily carries with it a corresponding need to consider in the most thorough-going way just how such a broadened electronic-surveillance policy for extreme public emergencies may be rightly and effectively devised in accordance with the requirements of the Constitution.

But this last, in turn, inevitably brings one back to the problem of *legislation*. It respectfully seems to us that only Congress can deal with this legislative problem—surely not the Legislatures of fifty States. Doubtless once Congress shall have acted on the problem, the State Legislatures may proceed in appropriate ways to accommodate their own

respective legislative arrangements to the Congressional plan. But there seems to be no escape from the need for national legislation by the Congress in the first instance.

And while, again, it is not our province (as we well realize) to tell the Congress of the United States how to go about fashioning such legislation to permit *constitutionally acceptable* electronic surveillance for cases of extreme public emergency, it may not be unfitting for us to indicate what would appear to be the minimum requirements of such legislation. There ought to be, it seems to us, a most careful definition of the term "extreme public emergency" or of some similar term, and such definition ought to make it absolutely clear that what is contemplated is an emergency involving major and imminent destructive physical danger to a community or a vital installation. There ought to be also, in any such legislation, the most meticulously assured provision that the authorization in any instance of proposed electronic surveillance shall be made by governmental authorities of the highest possible level; ideally also, or at least preferably, the legislation should include the additional requirement that judicial approval be obtained along with the high-level executive authorization for the electronic surveillance. There should also be appropriate provisions in the legislation for the preservation of a written record or minutes of the procedure of the application and of the approval thereof in each case. And, of course, there should be an express legislative prohibition against prosecutorial use of any evidence obtained. As regards the details of such legislation in the matter of Federal-State arrangements *inter sese*, we take it that this too should engage the careful attentions of the draftsman of such

legislation, but we do not presume to offer specific suggestions.

Again, having said all of the above about the apparent constitutional indispensability of legislation to validate electronic surveillance in cases of extreme public emergency or "national security", we respectfully repeat that neither such legislation nor, *a fortiori*, anything in the existing constitutional scene, could avail to validate the particular trespassory electronic room bugging done in the present case. Scarcely if at all to be considered in the analytical setting of the present discussion, is the circumstance that New York State's Code Crim. Proc. § 813-a provides a system of *ex parte* judicial permissiveness to ensure that, *inter alia*, the Playboy Nightclub in New York City shall receive a non-corrupt liquor license. For, if our foregoing remarks are correct, such judicial permissiveness never necessarily reaches at all the problem of constitutionally validating any particular instance of trespassory electronic room "bugging" even in cases of extreme public emergency or national security. Once it is conceded, as we think it must be (see the argument under our next subheading, p. 44, *infra*), that no trespassory room bugging can be constitutionally tolerated except perhaps in the above suggested areas of extreme public emergency or national security, the problem of advance judicial permissiveness becomes academic. We are ourselves so uncertain about the possibility of effectively or soundly requiring advance judicial permission or consultation even if only in such extreme public emergency or national security cases, that, as the Court may have observed, we did not strongly press this theme of judicial participation in our above discussion of the subject of emergency or national security cases.

Simply from the practical standpoint, then—if we are correct in our above argument—the question of advance judicial permission falls to the side in any constitutionally realistic discussion of tresspassory electronic bugging. We believe that this is a correctly stated fact, that it is of the first importance for an informed discussion of the subject, and that it is our duty to emphasise the point with all earnest insistence for this Court's attention. What we are saying is that, if it is the constitutionally correct conclusion that no tresspassory room bugging ought to be allowed except for non-prosecutorial action in extreme public emergencies and cases of "national security", and that even in such latter situations the question of advance judicial permission may quite likely tend to be simply impractical and therefore constitutionally unfeasible (which is to say constitutionally not required, in the nature of the case), then does it not necessarily follow that the question of advance judicial permission really has nothing to do with the constitutional validating *vel non* of tresspassory electronic bugging, since that question is not even (it would seem) constitutionally significant in the single area of such bugging here being postulated as constitutionally permissible (the area of extreme public emergencies or national security)?

Putting it in less ratiocinational terms, what we are saying is that, if tresspassory electronic room bugging in a case like ours is unconstitutional without advance *ex parte* judicial permission, the obtaining of such advance judicial permission cannot cure the unconstitutionality. Or, if the only tresspassory electronic room bugging which can conceivably be constitutional is that which might be done for national security or extreme public emergency purposes, there is no

point in setting up futile or purely academic systems of advance *ex parte* judicial permission for the categories of such bugging which in no event can be brought within the bounds of constitutional permissibility.

All of our foregoing discussion under the within sub-heading—where we have been addressing ourselves primarily to the topic of extreme public emergency or national security as affording the sole area for constitutionally permissible trespassory electronic room bugging—has involved an assumptiveness on our part. That is, our above discussion has overleaped the important intermediate problem of whether advance judicial permission may be constitutionally efficacious to validate trespassory room bugging in situations short of extreme public emergency or national security. Our above discussion has not covered in any detail, that is, the question of whether, in the extensive area of criminal law enforcement embracing cases short of “national security” or “extreme public emergency” crimes, advance *ex parte* judicial permission may render constitutionally acceptable the use by state police officers of electronic room bugs and the use of evidence thereby obtained in state criminal trials. We have deliberately deferred discussion of this latter subject, because we considered that the question of the constitutionality of judicial permissive trespassory electronic room bugging by state police could be best illuminated, as a matter of argumentive presentation, by first devoting attention to the contrasts between the claims of the indisputably necessary on one hand (“national security” and extreme public emergency), and the claims of the merely arguably necessary on the other hand (e.g., liquor license bribery), in matters of criminal law enforcement where police demand is made for the right to engage in electronic spying against private individuals.

Under our next subheading we shall take up, then, the question of whether *ex parte* judicial permission may constitutionally validate trespassory electronic bugging of the kind here done, when that question is formulated on the "law enforcement" assumption that the constitutional permissibility of such bugging is not limited to cases of national security or extreme public emergency. But before turning to the latter topic we offer the following concluding observations concerning the need for electronic spying in "emergency" or "security" situations vis à vis lesser crime situations of the sort have involved.

In the forefront of all discussion of the outlawing of police electronic surveillance is, of course, the argument that these electronic police techniques are needed and are very valuable for law enforcement. Anyone who comes to the study of this subject of the constitutionality of electronic surveillance will soon perceive, as he canvasses the copious literature, that in one way or another the branch of the debate which has to do with the needs of law enforcement always seems to create a sense of impasse as between the opposing sides of the debate. The law enforcement people and their supporters insistently keep saying that their work goes more easily and more successfully when they are allowed to use electronic surveillance. The better-advised opponents of police electronic spying do not try to deny these latter claims, or even to press unduly the counter-argument that capable police can find other ways of doing their job just about as well without electronic spying; and these better-advised opponents concentrate more on the sheer ineluctable unconstitutionality of the practice and its undesirability from the standpoint of social morality and national character. Thus, the debate, even

when conducted at its best, leads as we said to a kind of impasse which appears to be resolvable, to put it bluntly, only by one's choosing between the Constitution and the police—in the same way as one chooses between those two interests when the police have to be told that they may not improve their efficiency by extracting involuntary confessions from accused persons, or by denying them the right of counsel, etc.

However, this entire argument of police efficiency or utility *versus* the Constitution does not necessarily have to be reached at all in the present particular case. The key to resolving the latter argument in a case of the present type, involving alleged official corruption, lies in non-prosecutorial use of electronically obtained evidence. If the argument of police utility and law enforcement need must be given weight in a case of this type, why is it not sufficient for those purposes simply to clean up the alleged official corruption on the administrative level; why does the unconstitutionally obtained evidence have to be usable also for criminal prosecution in a court of law? We are by no means suggesting that the Constitution gives to the police or to State or Federal intra-agency security officers *carte blanche* to subject government officials to electronic spying to check on corruption and the like. This case does not present that issue, though doubtless the issue will be reaching this Court in that form before long when some dismissed government official contests such electronic spying. Our point here is that in a case of the present type the argument of police need is scarcely a compelling one, because if it is insisted that electronic spying was both indispensable and justifiable to clean up corruption in the New York State Liquor Authority, that purpose could be and we doubt not

has been accomplished on the administrative level, without needing also to pollute the constitutional processes of the State's courts of law by bringing criminal proceedings based on unconstitutionally obtained evidence.

We turn now to the topic which we reserved *supra*, the question of whether *ex parte* judicial permission may constitutionally validate trespassory electronic bugging in a case of the present type which does not involve the national security or extreme public emergency.

**It Is Impossible To Devise A Constitutionally Satisfactory "Judicial Warrant" Procedure For Trespassory Electronic Room Bugging. In Any Event, The Statute Here Involved (N.Y. Code Crim. Proc. §813-a) Fails Utterly To Afford Such A Constitutionally Satisfactory Procedure, If Only Because The Statute Expressly Contemplates Searches For "Evidence Of Crime".**

In *Lopez v. United States*, 373 U.S. 427, 464-465, the dissenting Justices broached the question of whether some procedure of constitutionally satisfactory judicial "warrants", in the sense of the Fourth Amendment, could be devised for electronic searches. The question was left unanswered in the *Lopez* dissent, although in a footnote (fn. 11, 373 U.S. 464) authorities were cited as containing suggestions of ways in which electronic searches could be made to comply with the Fourth Amendment. We have examined those authorities, the authorities which they in turn cite, and like literature post-dating *Lopez*, and the interesting conclusion is that, to our knowledge, no one has yet been able to propose any means for overcoming the two crucial constitutional difficulties, namely, the inevitability that an electronic search becomes a "general search", and the like inevitability that an electronic search becomes a search for "mere evidence".

The authorities on these problems of "general search" and "mere evidence" were exhaustively presented in the dissenting opinion in *Lopez, supra* (373 U.S. at 479 *et seq.*). Before further discussing the Federal cases on these points let us note the present status of the decisional law in the New York State Courts, where there is much dissatisfaction with the legislation here under challenge.

The dissenting Judges in the Court below in the instant case (Chief Judge Desmond and Judge Fuld), condemned the State judicially-permissive eavesdrop statute here involved (N.Y. Code Crim. Proc. §813-a)\* as having authorized electronic eavesdrops which "were unconstitutional under the Fourth Amendment and a physical intrusion into private premises and as a 'general search' for evidence" (p. 8, *supra*). Similarly in *People v. McCall*, 17 N. Y. 2d 152, 269 N.Y.S. 2d 396, 404-405, which involved wiretapping rather than room "bugging", Chief Judge Desmond, concurring for reversal of a judgment of criminal conviction, denounced all electronic eavesdropping on the ground, *inter alia*, of its "general search" character. Judge (now Chief Judge) Fuld, in a separate concurring opinion in the *McCall* case, *supra*, finding that the affidavits in support of the wiretap order there involved were inadequate, and noting also that he adhered to his dissent in *People v. Dinan*, 11 N. Y. 2d 350, 357 (that State wiretapping violates the Federal Communications Act), stated that, "In this view, I also find it unnecessary to reach or consider the broad constitutional issue discussed by the Chief Judge" (269 N.Y.S. 2d at 403).

It may be mentioned also that on the same day on which the Court of Appeals decided the instant case (July 7, 1966), Chief Judge Desmond and Judge Fuld again expressed

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\* Quoted at p. 62, *infra*.

their constitutional disapproval of any New York State wiretapping by reason of the Federal Communications Act. *People v. Cohen*, 18 N.Y. 2d 650, 651, cert. denied — U.S. —, 17 L. Ed. 2d 438.

We are calling attention to these several recent indications of ferment among the New York State Judiciary on the subject of electronic eavesdropping (including both room "bugging" and wiretapping) because we respectfully think that it is proper to refer to these developments where, as here, a party is requesting the highest Court in the land to make an important new judgment of constitutional policy—i.e., to adjudge that State permissive legislation will not at all necessarily avail to take State electronic room "bugging" outside the ban of the Constitution.

The foregoing does not exhaust the instances of recent dissatisfaction with electronic eavesdropping in authoritative official quarters in New York State. In *People v. Leonard Grossman*, 45 Misc. 2d 557 (S. Ct. Kings Co. 1965), reversed\* 27 A.D. 2d 572 (2nd Dept. 1966), a noted judicial scholar, Justice Nathan Sobel, after referring to the decisions of this Court which forbid a search for "mere evidence",\*\* announced the reasoned conclusion that the statute here involved (N.Y. Code Crim. Proc. §813-a) is unconstitutional:

"\* \* \* It seems absolutely clear from the foregoing authorities that a search and seizure of *tangibles* which are *mere evidence* and a search and seizure of *intangibles* in the nature of conversations or verbal

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\* As to this reversal, see the footnote on the following page.

\*\* Justice Sobel cited *Gouled v. United States*, 225 U. S. 298, and the dissenting opinion of Mr. Justice Brennan in *Lopez v. United States*, 373 U. S. 427, where, as noted, the authorities for the "mere evidence" principle are collected and discussed.

statements would violate the Fourth and Fifth Amendments. It follows that no state statute could authorize a violation of the United States Constitution. To the extent that sections 792 and 813a of the Code of Criminal Procedure purpose to do so these statutes are unconstitutional." (*Italics in original.*)\*

See also *People v. Rial*, 25 A. D. 2d 28, 266 N.Y.S. 2d 426 (4th Dept. 1966), which reversed a conviction based upon electronic "bugging" of defendant's hospital room.

See also the illuminating discussion in the *Symposium, Constitutional Problems In The Administration Of Criminal Law*, the portion entitled "*Electronic Eavesdropping: Can It Be Authorized?*", Northwestern Univ. L. Rev., vol. 59 (Nov.-Dec. 1964), at pp. 639-640, where the authors were particularly discussing the statute here involved, N.Y. Code Crim. Proc. § 813-a:

"The last, and most likely to prove fatal, objection to the constitutionality of the statute is the requirement that a warrant particularly describe the things to be seized. It seems unlikely if not impossible for conversation to be particularly described. Even if one could adequately describe the conversations sought, the search, of necessity, would go far beyond what is described, for eavesdropping is of its nature indiscriminate. Innocent, as well as incriminating conversations would be overheard. The rights of those innocent parties who converse with the suspect, or for that matter with anyone on the tapped wire or the

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\* Justice Sobel's opinion in the *Grossman case*, *supra*, is cited with approval in the dissenting opinion in the instant case by Chief Judge Desmond and Judge Fuld of the Court of Appeals (p. 8, *supra*). As mentioned *supra*, the *Grossman* decision was reversed by the Appellate Division, on the authority of the instant case as decided by the court below. *People v. Grossman*, 27 A.D. 2d 572 (2nd Dept. 1966).

'bugged' premises, will be subjected to invasion of privacy. True, the usual search for tangible evidence often will invade the rights of innocent parties, but the search for conversation, often requiring long periods of auditing, does so almost inevitably." (Footnotes omitted)

The commonly termed "mere evidence" problem merges with the concept of the prohibited "general search". (See the recent denunciation of the odious "general search" in *Stanford v. Texas*, 379 U. S. 476.) There can exist no "probable cause" to arrest or to search for mere "future" crimes, and the entire corpus of the law of "probable cause" does not go beyond "past" or "present" crimes. E.g., *Brinegar v. United States*, 338 U. S. 160, 175-176. It is of the very essence of the constitutional law of unreasonable search and seizure, as such would sensibly apply to room eavesdrop "searches," that such may constitutionally be permitted (if at all) only upon a showing which meets the tests of "probable cause" that a crime has been committed or is being committed.\* And even so, there remains the extremely disturbing constitutional question as to whether *any* search for *mere evidence* (as distinct from fruits and instrumentalities of a crime) may be permitted—much less the outright dragnet kind of "search" involved in this case. See our last preceding footnote.

If a search for "mere evidence" is unconstitutional, then it follows, for our case, that the language in the eavesdrop statute (§ 813-a) permitting a room eavesdrop upon "reasonable ground to believe that *evidence* of crime may thus

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\* We show *infra* that the "mere evidence" test in the present case is only the beginning of the Fourth Amendment "search" problem because as to Petitioner Berger the eavesdrop application and orders operated in sheer dragnet fashion.

be obtained" is unconstitutional *on its face* if such be construed to allow room eavesdropping for any purpose which would not be strictly analogous to a search for "fruits and instrumentalities" of crime.

Furthermore, the same unreasonable act of search which violates a citizen's right of privacy under the Fourth Amendment may and usually does simultaneously violate his privilege against self-incrimination under the Fifth Amendment.\* *Boyd v. United States*, 116 U. S. 618; *Gouled v. United States*, 255 U. S. 298; and see Mr. Justice Brennan's dissent in *Lopez v. United States*, 373 U. S. 427. It is above all in the area of electronic eavesdropping that this interplay between unreasonable invasion of individual privacy\*\* and breach of the privilege against self-incrimination tends naturally to achieve its most vicious and intense form.

The inescapable constitutional infirmity in any system of court-permitted electronic eavesdropping is its intrinsic "general search" character, which must inevitably attach to *any* act or situation of electronic eavesdropping. Unlike a search under a search warrant where the things to be seized are explicitly described (as required by the Fourth Amendment), the eavesdropping electronic device conveys to the recording instrument or to the human monitor-auditor everything that is said in the eavesdropped room space.

We are aware that the "mere evidence" rule of this Court has been producing some disaffection lately in Courts of some States, but notwithstanding cases like *State v.*

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\* See *Malloy v. Hogan*, 378 U. S. 1.

\*\* Our references in this brief to the Ninth Amendment as a basis for the right of privacy, *supra*, have the support of *Griswold v. Connecticut*, 381 U. S. 479. See also 11 A.L.R. 3d 1296 ("Eavesdropping As Violating Right of Privacy").

*Bisaccia*, 45 N. J. 504, 213 A. 2d 185 and *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, we venture to say that *Gouled v. United States*, 225 U. S. 298, is still the law. Cf. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 918 fn. 10. See also *Hayden v. Warden*, 363 F. 2d 647, 651 *et seq.* (C.A. 4, 1966—opinion by Sobeloff, C.J.).

We have one further observation with regard to the "mere evidence" problem, and it relates to the specific factual way in which that problem takes form on the record of the instant trial. As the Court may see if it examines the eavesdrop proofs as introduced into evidence in this case in the garbled and virtually incoherent stenographic transcriptions thereof at R. 584-673 (and see Point III, *infra*), the only "evidence" in regard to the alleged Playboy conspiracy was an incidental comment about the Playboy enterprises having wanted a private membership key system. In other words, this item was in the most classic and "merest" sense an item of "mere evidence" of a merely tendentiously "corroborative" kind, amounting at most (and only in the remotest way) to some kind of supposed expression of "guilty knowledge". Moreover, this "Playboy" eavesdrop item, which dates from June 29, 1962, was undisputedly *after* the substantial completion of the alleged Playboy conspiracy phase. In short, the eavesdrop "evidence" in this case concerning the Playboy phase, inflammatory and fatally damaging though it was from the standpoint of the jurors in this lurid case, was at the same time, in terms of the test of "mere evidence" (as distinct from evidence of the fruits or instrumentalities of crime or evidence of crime being presently committed), a classic example of the "seizure" of oral "evidence" whose constitutional unfairness is condemned by the "mere evidence"

test. Likewise, as regards the Jacklone-Tenement Club phase of this case, the eavesdrop proofs (R. 496 et seq.), again, relate to a stage of the alleged conspiracy when all of the essential conspiratorial steps had been completed, except one, namely, the paying over of the balance of the alleged bribe money. Here again, then, is a classic instance of "mere evidence" to prove an alleged offense that has already in substance been committed, as distinct from the obtaining of fruits or instrumentalities of the crime, or the obtaining of proof of a crime being "presently" committed.

It remains to consider, in connection with the *pros* and *cons* of the theory of judicially permissive electronic searches, (1) the impact on the problem of *Osborn v. United States*, U.S. , 17 L. Ed. 2d 394, and (2) the country-wide picture of the variant legislative pattern affecting this subject among the fifty States.\* Each of these two topics will be treated under a separate sub-heading.

**The Effect On This Case Of *Osborn v. United States*,  
U.S. , 17 L. Ed. 2d 394.**

In *Osborn, supra*, this Court was called upon to deal for the first time with a situation of electronic auditing activity where prior judicial permission for the activity had been obtained. Reduced to the bare summary description of this last sentence of ours, the *Osborn* situation would admittedly appear to have a significant if not a decisive bearing on the

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\* Also, by way of a concluding argumentative presentation (Point IV, *infra*) we shall return to the topic of the constitutional acceptability of the New York State judicially permissive room-bug legislation as here applied, after taking up the question of the Fourth Amendment adequacy of the police affidavits and of the overall application procedures on which the *ex parte* judicial orders here involved were based, the latter subject being treated in Point II, *infra*, and after a short treatment also of the question of the probative quality of the recordings here involved (Point III, *infra*).

instant case. However, to conclude that this is so would be a stark over-simplification, as is readily demonstrable from a comparison of the two cases.

For purposes of such comparison (and distinction), the operative facts in *Osborn* were as follows:—On November 7, 1963 a man named Robert Vick had a conversation with Mr. Osborn in the latter's office, Osborn being an attorney for James R. Hoffa in a then pending criminal trial in the Federal Court in Nashville, Tennessee. In this conversation of November 7, 1963, which the parties continued in an adjacent alley outside Osborn's office, Vick and Osborn discussed bribing a prospective juror in the Hoffa trial. Immediately after this November 7 meeting with Osborn, Vick, who unbeknownst to Osborn had been operating as a Federal informer, reported the conversation to an agent of the United States Department of Justice. Vick was then requested to put his report in the form of a written statement under oath, which he did. The next day, November 8, this sworn statement of Vick was shown by Government attorneys to the two Judges of the Federal District Court, Chief Judge Miller and Judge Gray. After considering Vick's affidavit, the Judges agreed to authorize agents of the FBI to conceal a recorder on Vick's person to determine from recordings of further conversations between Vick and Osborn whether Vick's charges were true. When Vick went back to Osborn's office later that same day, November 8, the recording device did not work properly, and Vick made a written statement of what occurred during that meeting. The Government lawyers reported these circumstances to Chief Judge Miller, who then authorized that the recorder be used again on November 11, under stringent instructions (duplicating the original instructions on the

first occasion when Judges Miller and Gray had authorized the use of the recorder) that "the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was" (17 L. Ed. 2d at 399, fn. 6). Chief Judge Miller also stated, in explaining why he and Judge Gray had approved the use of the recorder, that, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practised in my court ever since I had been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug" (17 L. Ed. 2d at 399). Vick then went ahead and obtained the recording of a conversation of November 11, which indubitably inculcated Osborn—we note also that there was "no question of the accuracy of the recording" (17 L. Ed. 2d 398).

In the *Osborn* decision, where the Justices who had concurred or dissented in *Lopez v. United States*, 373 U.S. 427 (except Mr. Justice Douglas who dissented in *Osborn*, and Mr. Justice Goldberg who had meanwhile resigned from this Court) joined, the Court, after describing the facts substantially as we have above set them forth, stated as follows (17 L. Ed 2d at 399-400):

"The issue here, therefore, is not the permissibility of "indiscriminate use of such devices in law enforcement," but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the "re-

quirement of particularity" which the dissenting opinion in *Lopez* found necessary.<sup>8</sup>

The situation which faced the two judges of the District Court when they were presented with Vick's affidavit on November 8, and the motivations which prompted their authorization of the recorder are reflected in the words of Chief Judge Miller. As he put it, 'The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I have been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug.'

So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, it was imperative to determine whether the integrity of their court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.'<sup>9</sup> "

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<sup>8</sup> "I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication con-

stitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, I do not believe that, as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods." *Lopez v. United States*, 373 U.S., at 441, 10 L. ed. 2d at 472 (concurring opinion of The Chief Justice).

<sup>8</sup> 373 U.S., at 463, 10 L. ed. 2d at 485.

<sup>9</sup> "The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment,' *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272, 4 L. ed. 2d 1708, 1713, 80 S. Ct. 1463 (separate opinion); see *McDonald v. United States*, 335 U.S. 451, 455, 93 L. ed. 153, 158, 69 S. Ct. 191; *Abel v. United States*, 362 U.S. 217, 251-252, 4 L. ed. 2d 668, 693, 80 S. Ct. 683 (dissenting opinion), could be made a precondition of lawful electronic surveillance. . . ." *Lopez v. United States*, 373 U.S., at 464, 10 L. ed. 2d at 485 (dissenting opinion of Mr. Justice Brennan).

Thus the Court in *Osborn* was apparently able to obtain a consensus which included some of the divergent Justices in the *Lopez* case, on the basis that, under the remarkable and perhaps unique factual circumstances of the *Osborn* situation, there had come about an apparently phenomenal coincidence of circumstances which were deemed tolerable in Fourth Amendment terms as regards a constitutionally satisfactory advance judicial permission for an electronic search.

The probably unique circumstances in *Osborn*—not likely to be often repeated and surely bearing no remote resemblance to the circumstances of our case (details *infra*)—included the following:— The situation to which the proposed electronic search was addressed in *Osborn* was in the

highest degree a specific and particularized situation, both as regards the specificity of the criminal charge and the altogether practical feasibility of confining the electronic search to words or conversation which in all likelihood were going to relate exclusively to that specific criminal charge. Everything pointed to the fact that Vick was going to be meeting with Osborn on November 8, and then on November 11, specifically and solely for the purpose of carrying forward the specifically charged criminal project of bribing a juror in the *Hoffa* case. *Osborn* was in no sense, then, a situation in which the proposed electronic search for which advance judicial permission was sought, was going to partake of a "general search".

Nor, and this is most important, was the *Osborn* situation one in which the proposed electronic search was going to be a search for "mere evidence"; on the contrary, it was going to be a "search" aimed at catching the alleged criminal red-handed, so to say, in the actual "present" commission of the alleged crime.\*

Furthermore, there existed in the *Osborn* case an at least arguably over-riding public need—" \* \* \* It was imperative to determine whether the integrity of their Court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previously good repute" (17 L.Ed. 2d at 400). This last puts a case for

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\* Incidentally, as we showed at pp. 50-51, *supra*, the electronic search which we claim was unconstitutional in our case did manifestly violate the "mere evidence" prohibition. In its nature, also, it violated the "general search" prohibition. Additional distinguishing factors which we contend are decisive, as between our case and *Osborn*, are taken up in other connections at p. 57 and in Point II, *infra*.

electronic search with advance judicial permission which is a far cry from the justification sought to be made by the respondents in the present case, where alleged bribery in a scarcely vital governmental area (nightclub liquor licensing) was involved, and where in any event, as we earlier suggested, the matter of alleged official corruption involved could be quite effectively handled on a purely administrative level, i.e., without going to the extreme of using evidence of at least dubious constitutionality for the purposes of a criminal prosecution.

But above all the distinction between *Osborn* and our case lies in the radically different electronic technological methods used in the two cases. *Osborn* involved "a device concealed upon Vick's person during the November 11 meeting" (17 L. Ed. 2d 398). As the Court said in *Osborn*, "We thus deal here not with surreptitious surveillance of a private conversation by an outsider, cf. *Silverman v. United States*, 365 U.S. 505, \* \* \* but, as in *Lopez v. United States*, 373 U.S. 427, \* \* \* with the use by one party of a device to make an accurate record of a conversation about which that party later testified" (*ibid*). In other words, *Osborn* did not involve the surreptitious and trespassory room bugging method of electronic search which, we take it, this Court continues to regard as the most obnoxious method of unconstitutional electronic spying. It would require utmost ingenuity, we submit, to be able to demonstrate that the probably unique circumstances of *Osborn* with its "minifon"-type of electronic search, saves from unconstitutionality the New York State legislative system of judicially permissive electronic search as applied in the trespassory and completely surreptitious manner that was done in this case.

In our above discussion of *Osborn* as compared with our case we have not touched in any detail on still another point of distinction which we think is decisive, namely, the egregiously slack, conclusory and altogether perfunctory "factual showing" made before the "magistrate" in our case on the application for the electronic search "warrants", as contrasted with the meticulous and all but perfectionistically specific showing made to the District Judges in the *Osborn* case. This subject of the Fourth Amendment inadequacy of the electronic search "application" made in our case is taken up in detail in Point II, *infra*, where we treat the subject primarily from the standpoint of the within Question Presented No. 1 (p. 3, *supra*); and we respectfully ask the Court to consider our Point II treatment on this subject, *infra*, in connection with the point which we are treating under the present sub-heading (the distinction between the *Osborn* case and the instant case).

**The Country-Wide Pattern Of State Legislation For Electronic Searches On The Basis Of Advance Judicial Permission.**

We assume that this Court will wish to have information, in connection with the present case, as to the pattern of relevant legislation among the various States relating to electronic searches, i.e., the pattern of such legislation with respect to judicially permissive trespassory room bugging in private premises.

(In view of the controlling existence of this Court's exclusionary rule as to trespassory or physically intrusional electronic room bugging as laid down in the *Silverman*, *Clinton*, *Black* and *Schipani* cases, *supra*, there would appear to be no useful purpose in burdening the Court with

a catalogue of the legislation (or of the case law) of the various States which happens to be in conformity or not in conformity with that exclusionary rule; for surveys of the State authorities along such latter lines, see, *e.g.*, *Note, Eavesdropping and the Constitution: A Reappraisal Of The Fourth Amendment Framework*, 50 Minn. L. Rev. 378, 406-407; *Police Power And Individual Freedom*, Sowle ed. 1962, pp. 104-128).

The following States, in addition to New York, have statutory procedures for advance judicial permission of wiretapping or electronic eavesdropping (the text of the statutes mentioned below is printed in the Appendix hereto, *infra*):—

*Maryland* has a statutory procedure whereby any "public law enforcement officer" to whom "it appears that a crime has been, or is being, or is about to be committed," and that electronic eavesdropping "is required to prevent the commission of the crime or to apprehend the guilty persons," shall submit to the State's attorney of the County or of Baltimore City the evidence upon which the law enforcement officer bases a contention that an *ex parte* order authorizing electronic eavesdropping is necessary; and if it appears to the State's attorney that there are "reasonable grounds to believe that a crime has been committed or is being committed or may be committed", then the State's attorney shall apply to a Judge of the Circuit Court of the County or of the Supreme Bench of Baltimore City by a formal *ex parte* petition for an eavesdrop order, and the State's attorney shall make oath or affirm in his *ex parte* petition that "there is probable cause to believe that a crime may be, or is being, or has been committed", and

shall state the facts upon which said probable cause is based, and that the electronic eavesdropping is necessary in order "to prevent the commission of, or to secure evidence of the commission of such crime". The affiant must also identify, "with reasonable particularity", the eavesdrop device to be used, the place and person intended to be eavesdropped, and the crime suspected to have been or about to be committed. The affiant must also state that the evidence obtained will be used solely in connection with an investigation or prosecution of that crime. The Judge to whom the application is made "shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order". The order may be effective for not more than thirty days but may be renewed or extended. A record is to be kept of the application and order, which may apparently be made available subsequently to persons in interest after arrest. *Md. Ann. Code 1957*, as amended, Art. 27, §125A.

Maryland also has a similar, separate judicial *ex parte* order procedure for wiretapping. *Md. Ann. Code 1957*, as amended, Art. 35, §§ 94-96.

*Massachusetts* has a statutory procedure for *ex parte* court orders for wiretapping and eavesdropping. Such orders may be issued by a Justice of the Supreme Judicial or Superior Court upon application of the Attorney General or a District Attorney verified by oath or affirmation "that there are reasonable grounds to believe that evidence of crime may thus be obtained". The judicial finding that there are such reasonable grounds "shall be final and not subject to review". The order shall set forth its purpose, the location and person to be wiretapped or eavesdropped

"if known", the telephone line "if known", and the authorized personnel to conduct or supervise the wiretap or eavesdrop. Orders may run for three months and may be extended or renewed "in the public interest". A record is to be kept. "Emergency" wiretapping, and when a Judge is not available, may be authorized by the Attorney General or the District Attorney for seventy-two hours, after which Court validation must be sought. *Mass. Ann. Laws*, Ch. 272, § 99.

*Nevada* also has a court order procedure for wiretapping and eavesdropping, limited to the crimes of murder, kidnapping, extortion, bribery, "crime endangering the national defense", or narcotics, whenever "there are reasonable grounds to believe" that such crime "has been committed or is about to be committed", and "that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime", and "no other means are readily available for obtaining such evidence". The order may issue solely upon information or belief of a District Attorney or of the Attorney General, provided that "the precise source of the information and the ground for the belief" are given. The order may be for sixty days, renewable for a second sixty days, and further renewals may be for thirty days. *Nev. Rev. Stat.* §§ 200.660 to 200.680.

*Oregon* also has a court order procedure for wiretapping and eavesdropping, upon application by a District Attorney setting forth fully the facts and circumstances and stating that "there are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed", and that "evidence will be obtained essen-

tial to the solution of such crime, or which may enable the prevention of such crime", and that "there are no other means readily available for obtaining such information". Other provisions in the Oregon statute are procedurally similar to those of the other States above noted. *Ore. Rev. Stat.*, §§ 141.720 to 141.740.\*

It is submitted that with the possible exception of the Oregon legislation, whose abstemious limitation of the permissive court order system to crimes involving human life and national security is commendable; no indispensable legal or social value would be endangered by a ruling in the present case disapproving such State legislation. And even the Oregon statute is constitutionally unacceptable because it goes beyond *prevention* measures for the safety of human life or for national security, and extends to authorization of the use of the evidence for *prosecutorial* purposes.

As for the instant New York State legislation, N.Y. Code Crim. Proc. § 813-a reads as follows:

"§ 813-a. *Ex parte* order for eavesdropping

An *ex parte* order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evi-

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\* As this brief goes to press for final printing we learn that Illinois may have adopted similar legislation very recently. Our "library" research has not so disclosed, but we shall inquire directly in Illinois and shall advise the Court if the answer is affirmative.

dence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958."

The provision referred to in the opening clause of the above statute, namely, N. Y. Penal Law §738, reads as follows:

**"§ 738. Eavesdropping**

**A person:**

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of

instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping. Added L. 1957, c. 881, § 1, eff. July 1, 1957."

Thus the New York legislation offers no discernible constitutional advantage over the statutes of any of the other States as above noted. The New York court order procedure is unlimited as to the categories of crime for which it may be used. Its only standard is "reasonable ground to believe that evidence of crime may thus be obtained"—thereby flatly violating the "mere evidence" prohibition, as indeed do all of the above described statutes from the various States.

As earlier mentioned, we shall return to a further and concluding argument as to the constitutionality of this New York legislation after our treatment, which now follows as Point II, of the Fourth Amendment adequacy of the *ex parte* court order procedure as it was actually carried out in this case (and after treatment of another topic in Point III, *infra*).

## POINT II

**A. Even assuming the constitutionality of New York State's permissive Eavesdrop Legislation, the *ex parte* Court orders for the room "bugs" in this case, without which this prosecution stipulatedly could not have been instituted or maintained, are invalid under the Fourth Amendment because not based upon an adequate showing of probable cause.**

**B. Furthermore, the very fact that the instant New York legislation for judicially permissive electronic searches lends itself to so slack, perfunctory and altogether unsatisfactory a "Fourth Amendment" use as occurred in this case, raises an important consideration in evaluating the overall Federal constitutionality of this statute.**

In any particular instance where it is claimed by State prosecutive officials, as here, that a permissive State eavesdrop statute has been applied in such manner as to comply with the Fourth Amendment, it should be shown at the very least that the Fourth Amendment requirement of probable cause has been satisfied. Our discussion in Point I, *supra*, of the inter-related problems of "mere evidence" and "general search" indicates the larger doctrinal difficulties that must be overcome in satisfying the probable cause requirement at all in any imaginable electronic "search" of human conversations extending over a period of time in a particular room. But leaving aside these larger doctrinal difficulties, there remain the quite specific Fourth Amendment questions, acutely presented on the record in this case, of just what information was in fact presented to the "magistrate" in support of the application for permission to "search", and of whether "reason for crediting the

source of the information [was] given". E.g., *Aguilar v. Texas*, 378 U. S. 108; *United States v. Ventresca*, 380 U. S. 102, 109. The "reasonable grounds" requirement of N. Y. Code Crim. Proc. § 813-a is undisputedly equivalent to the probable cause requirement of the Fourth Amendment. Cf. *People v. Grossman*, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965), reversed on other grounds, 27 A.D. 2d 572 (2nd Dept. 1966); *People v. Beshany*, 43 Misc. 2d 521, 252 N.Y.S. 2d 110 (S. Ct. Queens Co. 1964). Cf. also *Draper v. United States*, 358 U. S. 307, 310 fn. 1; *United States v. Kancso*, 252 F. 2d 220 (C. A. 2, 1958); and *United States v. Vokell*, 251 F. 2d 333 (C. A. 2, 1958); cert. den. 356 U. S. 962, construing the "reasonable grounds" language in the Federal Narcotic Act arrest provision (28 U.S.C. § 7607) as meaning the same as "probable cause".

"\* \* \* It is elementary that in passing on the validity of a warrant, the reviewing Court may consider *only* information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U. S. 108, 109, fn. 1, citing *Giordenello v. United States*, 357 U. S. 480, 486. In the instant case the record of the proceedings on the motion to suppress suggests certain generalized implications by the prosecutor that the Judge who signed the *ex parte* eavesdrop orders (Sarafite, J.) was shown some data in addition to the formal affidavits in support of the application (R. 23-28, 52-55, 56), but we do not think there is any serious doubt that the only items shown to Judge Sarafite were the formal affidavits; we so contended in both of the appellate courts below, without serious claim to the contrary by the prosecution. And the affidavits referred to were of the most conclusory sort, as we shall now show.

Let us first note the pertinent contents of the *ex parte* orders themselves. In the Exhibit 2 papers, relating to the Steinman eavesdrop\* (R. 684-688), here is the sole language in Judge Sarafite's *ex parte* order (June 12, 1962) which goes to the question of what showing of "reasonable grounds" had been made to Judge Sarafite in support of the application for the Steinman eavesdrop order (R. 684):

"It appearing from the affidavits of David A. Goldstein and Alfred J. Scotti, Assistant District Attorneys of the County of New York, sworn to on June 11, 1962, that there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in Room 801 located at 15 East 48th Street, in the County, City and State of New York; and the Court being satisfied as to the existence of said reasonable grounds, \* \* \*"

Judge Sarafite's order (April 10, 1962) in the Exhibit 1 papers, relating to the Neyer eavesdrop (R. 680-683), is in exactly the same form as the above Steinman order, referring to affidavits by Assistant District Attorneys Jeremiah B. McKenna and Alfred J. Scotti.

As regards the affidavits of the two Assistant District Attorneys (Messrs. Goldstein and Scotti) in the Steinman eavesdrop application (R. 684-688), except for a reference in one paragraph to a "duly authorized eavesdropping device installed in the office of \* \* \* Harry Neyer," and an

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\* It will be recalled (pp. 5-6, *supra*) that the Steinman eavesdrop, the direct source of the eavesdrop evidence actually used in this trial, was the second of two such room-"bug" eavesdrops, the earlier one being the Nayer eavesdrop.

innocuous direct averment that Steinman was a prospective liquor license applicant and interested in certain nightclubs, all of the averments in the Goldstein affidavit are sheer unsupported conclusions based upon a general claim of or reference to "information" or "evidence" in the possession of the District Attorney's office; and Mr. Scotti's affidavit is merely an adoption by reference of Mr. Goldstein's.

The McKenna affidavit with regard to the Neyer eavesdrop (R. 680-682) follows the same conclusory pattern as in the Steinman eavesdrop papers, viz., that the District Attorney's office has "information" or "evidence". And it will be especially noted that the McKenna affidavit (*ibid*) does not refer to any antecedent eavesdrops or wiretaps, or indeed to any other evidentiary source. Mr. Scotti's affidavit *re* Neyer (R. 683) is in exactly the same form as in the Steinman papers (R. 688), i.e., it is merely an adoption by reference of Mr. McKenna's affidavit (R. 680) with an expression of "opinion" that "reasonable grounds" exist.

Further as to the Steinman eavesdrop-order papers (Exhibit 2—R. 684-688), the sole reference to "source of the information" was "a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer", but the Goldstein affidavit for the Steinman eavesdrop application (R. 685) did not include any statement or suggestion that the Neyer eavesdrop was the "source" of any of the "information" or "evidence" conclusorily mentioned in that affidavit except the "evidence" that "conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman". Nor did the Goldstein affidavit (*ibid*) contain one word from which Judge Sarafite could have judicially evaluated the

"reason for crediting" (this being this Court's language in the *Ventresca* case, *supra*), the Neyer eavesdrop "source"; i.e., evaluation of the audibility of the Neyer eavesdrop recordings, or of the reliability of the custodial chain, or of the accuracy of any "transcript", or, forsooth, evaluation of the soundness of the District Attorney's conclusory description of what that otherwise undescribed and wholly unevaluated "source" had produced.

Nor did the Goldstein affidavit for the Steinman eavesdrop (R. 685) contain one word in substantiation of the conclusory allegation that this amorphous item, the Neyer eavesdrop which was antecedent to the Steinman eavesdrop application, had in fact and in law been "duly authorized" as unsupportedly claimed by the District Attorney; it being an exceedingly critical question indeed in this case (see our further discussion, *infra*) whether the Neyer eavesdrop had been "duly authorized".

For—and we turn now to a more distinct examination of the Neyer eavesdrop-order papers themselves (Exhibit 1—R. 680-683)—the Neyer papers do not even contain a fragmentary reference (as in the Steinman papers—R. 684-688) to any prior eavesdrop but are drawn in a one hundred percent unrelievedly conclusory form. Totally ignored in the Neyer papers was the standard laid down by this Court in *Ventresca, supra*, that "reason for crediting the source of the information [be] given". The Neyer papers not only give no such "reason", they do not even give any such "source". Furthermore, even if this insuperable defect in the Neyer papers could be remedied (which we deny) by some informal showing that Judge Sarafite was given infor-

mation of pre-Neyer eavesdrops or minifons,\* such in itself would not save the Neyer eavesdrop order as being in compliance with § 813-a (and with the Fourth Amendment) unless there had first been fully litigated to the satisfaction of Judge Schweitzer—in the motion-to-suppress proceedings—all of the essential issues as to audibility, chain of custody of the machines and tapes, accuracy of “transcripts”, etc.

The foregoing refers primarily to the question of what was shown to the “Magistrate” (Judge Sarafite) who issued the *ex parte* eavesdrop or “search” orders. Consideration must be given also to the Fourth Amendment search problem commonly referred to as the problem of “the reliability of the informer”. *Draper v. United States*, 358 U.S. 307; *Jones v. United States*, 362 U.S. 257; *Henry v. United States*, 361 U.S. 98. See also *United States v. Ramirez*, 279 F. 2d 712, 715 (C. A. 2 1960), characterizing the *Jones* rule as being that “ \* \* \* the affiant must \* \* \* demonstrate that the informant has established a reputation for reliability so as to be worthy of belief.” The *Ramirez* Court went on to say that, “in addition, *Jones* may require that the affidavit include some factual information independently corroborative \* \* \* (of the reliable informant).” Who was the “informant” in the present case? The Neyer eavesdrop-order-papers (R. 680-683) are silent as to this, and the Steinman papers (R. 684-688) contain only the previously noted fragmentary reference to the allegedly “duly authorized” prior eavesdrop in Neyer’s

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\* We previously mentioned (p. 6) the minifon activities of the liquor licensee Panzini in conversations with Neyer and with Chairman Epstein’s aide Klapper (R. 23-28, 52-54). We urge *infra* that, in view of *Osborn v. United States*, *supra*, this very antecedent minifon activity was unconstitutional unless at least preceded by a proper permissive court order.

office. True, the People suggested or implied in our motion to suppress proceeding (but not in any affidavit applying for an *ex parte* eavesdrop order) that the "informant" consisted of a certain chain of minifons and eavesdrops, but we would now add to our previous remarks on this topic as follows: The ultimate "genesis" item is said to have been the Panzini-Klapper-Neyer minifons (R. 26-27). Was Panzini a "reliable" minifon functionary? What is Panzini's character background? Did he operate the minifon correctly, was the custody of the instrument and its recording spool "reliable"? The present record contains answers to none of these questions as to the antecedent minifon activity, yet without satisfactory judicial evaluation of all of this (as well as of the "reliability" of the subsequent eavesdrops and of the individuals involved therein and in the custody thereof, and of the "reliability" of the minifon "transcripts"), how could either Judge Sarafite (or Judge Schweitzer, the Trial Judge, in the motion-to-suppress proceeding) decide, respectively, to grant in the first instance and to sustain subsequently the eavesdrop orders?

The Fourth Amendment decisions preclude the giving of any weight to any "afterthought" suggestion on the part of the People in this case that they *could have* justified the Neyer and Steinman eavesdrop applications on the basis of anterior eavesdrops of which the People had knowledge but which we claim were not evaluatingly passed upon by Judge Sarafite and which undisputedly were not thus passed upon by Judge Schweitzer. *Jones v. United States*, 357 U.S. 493; *Go-Bart Importing Co. v. United States*, 282 U.S. 344; *United States v. Pollack*, 64 F. Supp. 554, 558 (D.N.J., 1946—per Forman, J.).

In any event the Neyer eavesdrop papers, being completely barren as to *any* source of the alleged information or evidence, are fatally deficient on their face under the "reasonable grounds" test of § 813-a when that statute is construed, as it must be, to conform with the Fourth Amendment. If the Neyer eavesdrop papers were bad then both the Neyer and Steinman eavesdrops and *all* of the evidence and leads upon which this prosecution is concededly dependent are bad. This is true both because the Steinman eavesdrop was expressly sought to be justified solely on the basis of the "duly authorized" Neyer eavesdrop, and because it is impossible to segregate the evidence and leads derived from the two eavesdrops. Moreover, the Neyer eavesdrop being earlier in time, its taint would infect all subsequent derivations.

Finally, is there not also necessarily presented in this case an outright question of constitutionality as to all of the minifon activity in this case which preceded both the Neyer and the Steinman eavesdrops and formed the ultimate generating source of the claimed justification for both of those eavesdrops and indeed for the entire investigation? Does not *Osborn v. United States*, — U.S. —, 17 L. Ed. 2d 394 strongly if not positively connote that electronic surveillance of the minifon type must comply with Fourth Amendment standards, specifically the Fourth Amendment requirement of "warrant"? The Court expressly stated in *Osborn* that the *ratio decidendi* on which the Majority Justices in that case joined, was that the "warrant" procedure of the Fourth Amendment had been complied with *via* the rather unusual circumstances of the advance judicial approval for use of the recording device which had been

obtained in *Osborn*. Since the entire issue of the Federal constitutionality of the electronic spying which was done in our case may well have to turn on the question of the Fourth Amendment adequacy of the affidavits used to obtain the within *ex parte* court orders, i.e., since this case may turn on the Fourth Amendment constitutionality of the particular *ex parte* court orders involved rather than on the larger question of statutory constitutionality, we are respectfully obliged to request the Court to devote its particular attention to our above suggestion that the anterior minifons used in this case were in themselves unconstitutional for failure to obtain advance judicial permission for their use. It seems to us also that this contention of ours is rendered the more realistic by the fact that, at the operative times, there was in existence the New York State legislation here involved which both affords opportunity for and requires resort to the processes of application for an *ex parte* court order for electronic eavesdropping.

We therefore submit that, even if N. Y. Code Crim. Proc. § 813-a were not subject to the larger constitutional infirmities described in our Point I, *supra*, its application in the instant case would be violative of the Fourth Amendment for failure to satisfy the requirements of probable cause in regard to the showing made before the "Magistrate" who issued the *ex parte* eavesdrop orders; that the failure to obtain any judicial approval at all as to the minifons which were the generating source of the whole investigative procedure was fatal in any event under the Fourth Amendment; and that a permissive State eavesdrop statute sought to be applied in a manner so flagrantly violative of the most elementary requirements of Fourth Amendment

probable cause must be disapproved by this Court lest otherwise permissive State legislation designed for the awesome purpose of "validating" trespassory electronic eavesdrops in the private room premises of private individuals receive unmerited constitutional approbation by default, as it were.

### POINT III

**The abysmally poor probative quality of the eavesdrop recordings in this case should be taken into consideration in the Court's overall determination of whether this case is a proper vehicle for sustaining the constitutionality of the legislation here involved and as applied.**

In presenting argument under the above point heading we are by no means overlooking the fact that the grant of certiorari in this case excluded a "Question Presented" in our petition for certiorari (Question No. 4, Pet. Cert. 3) which tendered the issue of the probative quality of the recordings as a distinct issue of due process. In this Point III we are endeavoring to orient the question of the probative quality of the recordings within our basic argument as to statutory unconstitutionality in this case.

We are keenly aware that in criminal cases where conviction has been secured on the basis of sound recordings the reviewing Courts practically take it for granted that they will have to hear an argument about audibility of the recordings; an understandable attitude of conditioned judicial skepticism may confront the party who offers such argument. We respectfully assure this Court that despite our awareness of this "fact of life", we feel absolutely

justified in making the argument of inaudibility in this case because the record proofs in support thereof seem to us overwhelming, and because larger implications flowing from the fact of the poorness of the recordings seem to us to be relevant for the purpose of evaluating the constitutional fairness of the permissive New York State eavesdropping system as here sought to be applied.

As earlier stated, the recording which was played for the Jury in this trial was a single tape, Exhibit 61-A (R. 497, *et seq.*). It purportedly contained conversations of June 28 and 29, 1962 at Harry Steinman's office—between Steinman and petitioner Berger on June 28, and Steinman, petitioner Berger and Jacklone on June 29. The conversations of both those days allegedly dealt with the Jacklone-Tenement matter. The conversations of June 29 allegedly dealt also with the Playboy matter.

Before any recording was played for the Jury the Trial Court held a "dry run" playing, attended by three court stenographers to test audibility (R. 203-204, 584-673). This dry run covered tapes additional to the one which eventually went into evidence and was played for the Jury, and apparently the Court itself concluded that two such other tapes offered by the People were so hopeless that they must be excluded (R. 231-232). The remaining tape, Reel No. 5483 (Exhibit 61-A), did not deserve any greater favor. The dry run was on October 15, 1964. On October 19 defense counsel reported to the Court that the stenographers were not making any transcripts at all because they understood that it was the Court's instruction not to transcribe what they could not hear (R. 203). The Court replied, "I did have a complaint from each of the three

reporters, expressing their difficulty in making a transcription because of their inability to hear what was said, and I did say, 'Well, you can't transcribe what you didn't hear' " (R. 204). The District Attorney interposed, by way of egregious understatement, we must say, that "There are portions of the tape that are inaudible", and he asked for another try, with earphones, before any transcribing was attempted (R. 204), but the Court directed that the dry run recordings be transcribed "for whatever they are worth" (R. 204).

We devoted nearly one hundred printed pages in our printed appendix in the Court below (R. 584-673) to the respective transcriptions by the three stenographers of both the dry run of October 15, 1964 and of the evidentiary courtroom playings of the recording for the Jury on October 20, 1964; these transcriptions are in addition to the evidentiary transcription that was made for the purposes of the official trial record (R. 498-515).<sup>\*</sup> No recital can substitute for the raw text itself of these appalling transcriptions when each one is read from beginning to end and when the entire reading is done within a sufficiently short span of time to give the reader the "benefit" of a panoramic comparison. In virtually every item in the recording as transcribed by the several stenographers one would scarcely know that the stenographic auditors had been listening to the same words. If there was ever a case in which an elec-

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<sup>\*</sup> As just noted, the transcriptions printed at R. 584-673 include, in addition to the three separate dry run transcriptions of October 15, 1964, a transcription by each of the same three stenographers during the evidentiary playing of the recording at the trial on October 20, 1964. That is, the evidentiary "run" was taken down not only by the regular court stenographer assigned to the trial at that time but also by the three stenographers who had taken the dry run on October 15.

tronic eavesdrop recording was manifestly worthless as "evidence" it was here.

The facts elicited by the defense cross examination of the police wiremen in the conducting of the eavesdrops in Steinman's office pointed unmistakably to the altogether predictable conclusion that the recordings must turn out to be worthlessly flawed.

For example, Detective Boleslaw Baransky, when asked whether the building where Steinman's office is located had structural aspects which would adversely affect the fidelity of electronic eavesdropping mechanisms, said that he did not know (R. 314). He also did not know whether there were air conditioners in Steinman's office (R. 315-316). He had no information about the power system for the elevators in the building, and he admitted that elevator noise could affect the microphone or "bug" device here used (R. 316-317). Nor had he made any check as to compressors in the building, which he admitted also could affect the microphone (R. 317-318). He did not even know when or whether he had checked the "ordinary little six-volt storage battery" which was the only power source for the microphone, and which had been installed on June 16, 1962, nearly two weeks before the particular eavesdrop days here involved (*ibid*). He had no idea as to what might be the effect of passing automobiles with radios in operation experiencing "drift" and generating static, and he admitted that this could cause interference (R. 319-320). He had made no check whatsoever of conditions of power surge in the location (R. 320-321). He had not even made a test of transmission and reception when the recorder was hooked up, which was two days after the microphone was installed

(R. 322). He was flatly "unable to say", as to these various types of interference, whether they had affected this microphone (R. 323-324).

On the all important question—i.e., important for compliance with the minimum legal standards for authentication of sound recordings (see authorities, *infra*)—of whether anyone engaged in the electronic eavesdropping activity had been able in person to hear any significant items as received over the wiring system, in other words whether the recording had been meaningfully audible to the human ear at the time it was coming through the microphone, we find in the trial record testimony by only one witness, Detective Reilly, and this limited to only the eavesdropping of June 28, 1962, and consisting of only the meaningless fragments appearing at R. 291-293.

Of perhaps even greater interest than the foregoing was the testimony of the several detectives who participated in making "accurate transcripts" of the recordings. See R. 354-358, 360-395, where it is brought out that the preparation of the "accurate transcripts" by the detectives had involved literally many hundreds and perhaps thousands of re-playings of the tape, continual multi-mutual corrections and emendations of notes among the respective several detectives aiding each other, and in the final product there still remained numerous gaps and uncertainties.

A proper foundation must be laid before electronic recordings are allowed in evidence. The leading treatment of this subject is the Annotation in 58 A.L.R. 2d 1024, "Admissibility of Sound Recordings In Evidence", See especially § 7 ("Omissions and Inaudibility"), and see also § 4 ("Neces-

sity and Manner of Authentication"); the "A.L.R. 2d Later Case Service" contains considerable additional significant case law on this subject, the original Annotation in volume 58 having been published in 1958. The Annotation points out that one of the cardinal requirements for authentication of a recording is that a human listener shall have been able to hear the sounds received by the recording mechanism (see § 4 of the above mentioned annotation). We have above noted the flimsiness of the People's sole proof on this aspect—the testimony of Detective Reilly of hearing a few fragments on June 28, 1962 (R. 291-293).

The frequency with which imperfect recordings do receive judicial acceptance in this country prompts us to comment as follows: Would the courts of this country tolerate, in the proffering of any other form of evidence, for example, documentary evidence, such physical imperfections, such pervasive lacunae, such fragmentation and shredding and all-around spoilage of the "text", such clumsy mutilation, such net undecipherability as in the eavesdrop recordings here involved? Would our courts tolerate, in any documentary proof, or in any human witness' memory on the stand, this patchy, disintegrated sort of probativeness? What is there about electronic eavesdropping that should so often endow it, above all other modes of proof, with such a unique undeclared but effective immunity from the traditional rules of Anglo-American judicial proof? Electronic eavesdropping, because of its offensiveness to the civilized decencies of a free society, and not less because of its susceptibility to "gaps" and "inaudible parts" as is so dramatically instanced in this case—why, is it that one

never seems to get audible police recordings which are *exculpatory* of a defendant—ought to be treated, under the tests of probativeness, as the lowest, not the highest quality of proof is treated.

If permissive State statutory systems for electronic room “bugging” are to be seriously considered by this Court as deserving Fourth Amendment approval, we submit that one indispensable factor which should enter into this important constitutional inquiry in any particular case is the intrinsic probative unreliability of the recordings, a factor so vividly present in this case.

#### POINT IV

##### **Recapitulation of Petitioner's Constitutional contentions.**

In the light of all of the foregoing, we may now re-formulate the issue of the Federal constitutional tolerability of the New York State permissive eavesdrop legislation as applied in this case.

Analogies drawn from the area of search warrants as such are not likely to be controlling in the room eavesdrop area, for permissive court orders as to such eavesdrops would in their nature continue to be secret and *ex parte* both in the stage of the obtaining of such orders and in the stage of the execution thereof, whereas search warrants of course may not be secretly executed. Nor may search warrants ever allow a search for “mere evidence” as appears to be allowable under the permissive *ex parte* court-order procedures of § 813-a, Code Crim. Proc. Above

all, the search warrant analogy is useless because eavesdropping *ipso facto* effects a "general search" of *all* conversation during the eavesdropping, whereas search warrants must specify exactly what is to be "searched" and "seized". The Fifth and Ninth Amendment considerations fortify the case against any such Federal constitutional validation of trespassory electronic spying; the right of privacy and the privilege against self-incrimination deserve a better fate than would be portended if this case is affirmed.

The peculiar constitutional odiousness of the room eavesdropping activity in this case cries out for correction by this Court. If ever there is going to be a case in which permissive room eavesdrop procedures comparable to those in § 813-a may be sustained as constitutional by this Court, it should not be a case in which such a statute has been held by the State Courts to permit the procedural slackness, the conclusoriness of affidavit averments, the failure even to cite much less to substantiate the reliability of any sources of alleged information, the "bootstrap" use of a whole evolving series of eavesdrops generating one another, the dragnet character of the "search", and the profoundly unsatisfactory probative quality of the "recordings". The Fourth, Fifth, Ninth and Fourteenth Amendments should not be thus lightly overborne.

## CONCLUSION

**It is respectfully submitted that the judgment of the Court below should be reversed and the prosecution against petitioner Berger be ordered to be dismissed.**

Respectfully submitted,

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*Ralph Berger*

ABRAHAM GLASSER  
*On the Brief*

[APPENDIX FOLLOWS].

## APPENDIX

**1. N.Y. Code Crim. Proc. §§813-c to 813-e (procedure for motion to suppress).****§813-e. The motion in general**

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

**§813-d. Time of making and determination**

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure

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of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses; the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as

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if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, §1; L.1964, c. 490, eff. July 1, 1964.

§813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

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If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, §1, April 29, 1962.

**2. Maryland Permissive *ex parte* Court order Procedure for Electronic Search, Md. Ann. Code 1957, as amended, Art. 27, §125A(b).**

(b) *Prevention of crime or apprehension of criminal—Petition for ex parte order authorizing use.*—However, if it shall appear to a duly authorized public law enforcement officer of this State that a crime has been, or is being, or is about to be committed, and that the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it, then the law enforcement officer or officers shall submit to the State's attorney of the county or of Baltimore City the evidence upon which the said law enforcement officer

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bases his contention that an ex parte order authorizing the use of the said electronic devices is necessary; and if it shall appear to the said State's attorney that there are reasonable grounds to believe that a crime has been committed or is being committed or may be committed then the said State's attorney shall apply to any of the judges of the circuit court of the county or of the Supreme Bench of Baltimore City, by means of a formal ex parte petition for the issuance of an order authorizing the use of the said electronic devices or equipment, and shall make oath or affirm in the said petition that there is probable cause to believe that a crime may be, or is being, or has been committed and shall state the facts upon which said probable cause is based, and further, that the use of the said electronic devices or equipment is necessary in order to prevent the commission of, or to secure evidence of the commission of such crime. In such case the affiant shall identify, with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have been, or about to be committed, and that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued. The applicant must state whether any prior application has been made in the same matter and if such prior application exists the applicant shall disclose the present status thereof.

(c) *Same—Issuance of order, duration; disposition.*—The judge of the circuit court of the county or of the Su-

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preme Bench of Baltimore City shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order. Such ex parte order shall be effective for the time specified in the order, but for not more than thirty days unless extended or renewed by the judge, upon proper petition meeting the same requirements as the original petition. Any ex parte order so issued shall be retained by the applicant as authority for the use of the electronic device or equipment therein set out and the interception of the conversation sought to be intercepted. A true copy of such order, together with any exhibits submitted with the petition shall be sealed and filed with the clerk of the court in which the order is issued, at the time of its issuance, provided, however, that such order shall be available to persons in interest after arrest, upon order of the court. (1959, ch. 706.)

**3. Massachusetts Permissive *ex parte* Court Order Procedure for Electronic Search, Mass. Ann Laws, Ch. 272, §99.**

**§ 99. EAVESDROPPING.**

Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly, or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless

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tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.

Such order may be issued and shall be signed by any justice of the supreme judicial or superior court upon application of the attorney general or a district attorney for the district verified by his oath or affirmation that there are reasonable grounds to believe that evidence of crime may thus be obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Said order shall describe or identify (1) the purpose thereof; (2) the location of and the person or persons who are to be so overheard or whose communications are to be so intercepted if known; (3) if telephone communications are to be so intercepted the telephone lines if known; (4) the person or persons who are authorized to so overhear or intercept, or the person or persons under whose supervision such overhearing or interception is to be conducted.

In connection with the issuance of such an order, the justice may examine on oath the applicant and any other witness he may produce, for the purpose of satisfying himself of the existence of reasonable grounds to believe that evidence of crime may be thus obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Any such order shall be effective for the time specified therein, but not for a period of

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more than three months, unless extended or renewed by the justice who signed and issued the original order, upon satisfying himself that such extension or renewal is in the public interest. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for such interception or directing such overhearing or interception of the telephone communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained personally by the judge or justice issuing the same. In case of emergency and when no such justice is available, the attorney general or the district attorney for the district may issue such order, but within seventy-two hours thereafter the said attorney general or district attorney upon oath or affirmation setting forth all the facts, shall apply to a justice of the supreme judicial or superior court for a court order to issue validating the acts of said attorney general or district attorney. If the court refuses, after hearing, to validate such prior order of the attorney general or district attorney, said prior order shall cease to be effective, and no further action thereunder may be taken. (Amended by 1959, 449, § 1, approved Aug. 10, 1959; effective 90 days thereafter.)

**4. Nevada Permissive *ex parte* Court Order Procedure for Electronic Search, Nev. Rev. Stat. §§200.660 to 200.680.**

*200.660 Court order for interception: Contents of application; effective period; renewals.*

1. An *ex parte* order for the interception of wire or radio communications or private conversations ~~may~~ be issued by

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the judge of the district court or of the supreme court upon application of a district attorney or of the attorney general setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that the crime of murder, kidnapping, extortion, bribery or crime endangering the national defense or a violation of the Uniform Narcotic Drug Act has been committed or is about to be committed; and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime; and

(c) No other means are readily available for obtaining such evidence.

2. Where statements in the application are solely upon the information or belief of the applicant, the precise source of the information and the grounds for the belief must be given.

3. The applicant must state whether any prior application has been made to intercept private conversations or wire or radio communications on the same communication facilities or of, from or to the same person, and, if such prior application exists, the applicant shall disclose the current status thereof.

4. The application and any order issued under this section shall identify fully the particular communication facili-

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ties on which the applicant proposes to make the interception and the purpose of such interception.

5. The court may examine, upon oath or affirmation, the applicant and any witness the applicant desires to produce or the court requires to be produced.

6. Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the order may, upon application of the officer who secured the original order, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

(Added to NRS by 1957, 334)

*200.670 Application for order, documents, testimony confidential; disclosure of information prohibited.*

1. During the effective period of any order issued pursuant to NRS 200.660, or any extension thereof, the application for any order under NRS 200.660 and any supporting documents, testimony or proceedings in connection therewith shall remain confidential and in the custody of the court, and such materials shall not be released nor shall any information concerning them be disclosed in any manner except upon written order of the court.

2. No person shall disclose any information obtained by reason of an order issued under NRS 200.660, except for the purpose of obtaining evidence for the solution or pre-

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vention of a crime enumerated in NRS 200.660, or for the prosecution of persons accused thereof, unless such information has become a matter of public record in a criminal action as provided in NRS 200.680.

(Added to NRS by 1957, 334)

200.680 *Admissibility of information in evidence.*

1. Any information obtained, either directly or indirectly, as a result of a violation of NRS 200.620, 200.630, 200.640 or 200.650 shall not be admissible as evidence in any action.

2. Any information obtained, either directly or indirectly, pursuant to an effective order issued under NRS 200.660 shall not be admissible in any action except:

(a) It shall be admissible in criminal actions involving crimes enumerated in NRS 200.660 in accordance with rules of evidence in criminal cases; and

(b) In proceedings before a grand jury involving crimes enumerated in NRS 200.660.

(Added to NRS by 1957, 334)

200.690 *Penalties.* Any person who willfully and knowingly violates NRS 200.620, 200.630, 200.640, 200.650 or 200.670 shall be guilty of a felony.

(Added to NRS by 1957, 334)

*Appendix***5. Oregon Permissive *ex parte* Court Order Procedure for Electronic Search, Ore. Rev. Stat. §§141.720 to 141.740.**

141.720 Order for interception of telecommunications, or conversations. (1) An *ex parte* order for the interception of telecommunications, radio communications or conversations, as defined in ORS 165.535, may be issued by any judge of a circuit or district court upon verified application of a district attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed.

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(c) There are no other means readily available for obtaining such information.

(2) Where statements are solely upon the information and belief of the applicant, the precise source of the information and the grounds for the belief must be given.

(3) The applicant must state whether any prior application has been made to obtain telecommunications, radio communications or conversations on the same instrument or from the person and, if such prior application exists, the applicant shall disclose the current status thereof.

(4) The application and any order issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof.

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(5) The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(6) Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the warrant or order may, upon application of the officer who secured the original warrant by application, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

[1955 c. 675 §3; 1959 c. 681 §4]

141.730 Proceeding under expired order prohibited. Any officer who knowingly proceeds under an order which has expired and has not been renewed as provided in ORS 141.720 is deemed to act without authority under ORS 141.720 and shall be subject to the penalties provided in subsection (2) of ORS 141.990, as though he had never obtained any such order or warrant.

[1955 c. 675 §4]

141.740 Records confidential. The application for any order under ORS 141.720 and any supporting documents and testimony in connection therewith shall remain confidential in the custody of the court, and these materials shall not be released or information concerning them in any manner disclosed except upon written order of the court. No person having custody of any records maintained under ORS 141.720 to 141.740 shall disclose or release any materials or information contained therein except upon written order of the court.

[1955 c. 675 §5]